SUPREME COURT U. S.

Office-Supreme Court, U.S.
FILED
AUG 6 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1964

No. 355

Civil File No. 150-212

BERNARD SUSSER, GERTRUDE SUSSER and SHIRLEY SCHWARTZ, *Petitioners,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 152-119

LESTER N. MODICK and HARRIET M. MODICK, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 152-120

MARTHA M. McCOY and FRANK T. McCOY, *Petitioners,*

against

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 153-193

JAMES OSSOLA and ELIZABETH G. OSSOLA, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 153-194

JOSEPH P. PHELAN, *Petitioner,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

(Continued on Reverse Side of Cover)

Civil File No. 60 Civil 63

JAMES P. PIERCE, RITA PIERCE, LYLE FREDERICK, LEROY M. FREDERICK, ALFRED MUELLER and SOL RODENS, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

Civil File No. 60 Civil 1096

MATTHEW SEU and JANE L. SEU, *Petitioners,*

against

CARVEL CORPORATION, CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, EAGLE CONE CORPORATION, H. P. HOOD & SONS, *Respondents.*

Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

Civil File No. 60 Civil 2042

JOSEPH PAZDRO and YOLANDA PAZDRO, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SIDNEY W. ROTHSTEIN,
Attorney for Petitioners,
350 Broadway,
New York City.

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Civil File No. 60 Civil 1990

PAUL S. GIBERMAN and GERTRUDE GIBERMAN, *Petitioners,*

against

CARVEL STORES OF NEW YORK, INC., CARVEL DARI-FREEZE STORES, INC., CARVEHICLE CORP., CARVEL CORPORATION, CARVEL STORES OF PENNSYLVANIA, INC., CHAIN LOCATIONS OF AMERICA, INC., RAKESTRAW'S DAIRY PRODUCTS, INC., *Respondents.*

Civil File No. 60 Civil 2042

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the United States Court of Appeals for the Second Circuit is not yet reported, but is printed as Appendix A to this petition. The opinion of the trial court is reported in 206 F. Supp. 636 and is set forth herein as Appendix B.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered May 8, 1964. The jurisdiction of this Court in invoked under Title 28 U. S. C. 1254(1).

Questions Presented

1. Whether the admitted sales policy and practice of the Carvel respondents, whereby they conditioned their franchise to retail dealers, the use of their trade marks and the sale and lease of their patented equipment, upon the dealer's purchase, use and sale in connection therewith other unpatented products of said respondents, violates Section 3 of the Clayton Act.

2. Whether such admitted tie-in sales are per se violations of Section 3 of the Clayton Act.

3. Whether an exclusive dealing contract, where it is an integral part of a proscribed tie-in arrangement, is a per se violation of Section 3 of the Clayton Act.

4. Whether trademark protection justifies proscribed tying and exclusive dealing contracts.

5. Whether the agreements between Carvel and the supplier respondents, whereby the latter are obliged to refrain from dealing with or selling to petitioners, violate the Sherman Act.

6. Whether the admitted practice and policy of the Carvel respondents constitutes unlawful price maintenance in violation of the Sherman Act.

Statutes Involved

Title 15, United States Code.

§ 1. Trusts, etc., in Restraint of Trade Illegal: Exception of Resale Price Agreements: Penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: July 2, 1890. C. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c. 281, 69 Stat. 282.

§ 14. Sales, etc., on Agreement not to use Goods of Competitor

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create

a monopoly in any line of commerce. Oct. 15, 1914, c. 323, § 3, 38 Stat. 731.

Statement of the Case

Petitioners were plaintiffs in nine private antitrust suits brought in the Southern District of New York. Each was or had been a franchisee of one of the Carvel respondents. There was a joint trial before the court on the issue of liability alone. Petitioners agreed to rely solely on per se violations and to limit their evidence to written agreements and other documents.

The several Carvel corporate respondents (referred to collectively as Carvel) franchise independent dealers to manufacture and sell at retail, under various Carvel trademarks, a soft ice cream product. Patented, as well as unpatented, equipment is both sold and leased to the dealer by Carvel, and the franchise agreement requires him to (a) purchase from Carvel or approved sources his entire requirements of ice cream mix and all other ingredients used in the manufacture and sale of the end product; (b) to use only such products with such equipment; (c) to sell no other product other than that processed from Carvel mix through Carvel freezers; (d) to refrain from selling or dealing in any unauthorized products; and (e) to devote his store and premises solely to the sale of Carvel frozen dairy products. Upon termination of the franchise, the dealer is obligated to refrain from engaging in a similar business for five years and within a radius of 25 miles of his store.

The supplier respondents (Eagle Cone Corporation, H. P. Hood & Sons, and Rakestraw's Dairy Products, Inc.) each contracted to sell Carvel all of Carvel's requirements of ice cream mix and cones, which Carvel in turn resold to the dealers. The effect of such contracts was to obligate the supplier to refrain from dealing with the franchisee. Additionally, under the Hood and Rakestraw's agreements,

these suppliers agreed to deliver only Carvel mix to the dealers and no other ice cream mix or ice cream preparation of any kind.

It is undisputed that each dealer was an independent businessman operating a store, usually a roadside stand, where he manufactured and sold at retail ice cream products from and with supplies and equipment acquired from and furnished exclusively by Carvel. His activities were controlled and dictated not only by the franchise agreement but by the Standard Operating Procedure Manual (SOP) which, by agreement, was an integral part of the franchise. Carvel also maintained a system of supervision to report on the dealer's use or sale of unauthorized material. Such unauthorized use or sale could subject the dealer to forfeiture of his franchise, his capital investment and his ability to continue in a similar business.

Respecting prices charged by the dealer, Carvel exacted requirements of "recommended" and "standard" prices, insisted upon the maintenance of ten cent and twenty cent prices on cones, specified the minimum portions in all end products, prohibited sales at less than standard prices without prior approval, solicited the cooperation of dealers to report price deviations in order to secure adherence to recommended and standard prices, promoted agreements between dealers to maintain a level of prices and specified point-of-sale signs and other advertising material required to be used by the dealer and containing prices established by Carvel.

In addition to the franchise, Carvel leased to petitioners the land on which their stores stood. Petitioners in turn gave to Carvel a conditional reassignment of their leases to become effective upon breach of the lease or of the franchise agreement. The leases also provided that breach of the franchise constituted breach of the lease.

In 1959, Carvel franchised stores numbered between 350 and 400 and were located in at least nine states. In 1960, Carvel's gross sales of ingredients and supplies totaled $3,965,923. Equipment sales increased this figure to $4,460,689. The sales of ice cream mix alone in 1960 totaled $2,611,324.

Reasons for Granting the Writ

There are several important reasons why the Writ of Certiorari should be granted in this case:

1. The partial dissent of Judge Lumbard who found that "plaintiffs * * * proved the essentials of a tying arrangement proscribed by the Clayton Act".

2. The initial decision of a Federal Trade Commission hearing examiner who found, despite the Court of Appeals decision in this case, that the Carvel franchise agreements and policing activities are unlawful (1964 CCH Trade Regulations Reports, pars. 16440, 16921).

3. The apparent modification of the *per se* rule by the District Court's and Court of Appeals' decisions immunizing a trademark owner from the proscriptions of the antitrust laws.

4. The presumption of the requisite economic leverage, sufficient to invalidate a tying arrangement, from the use of the Carvel trademarks.

5. The franchise system, together with its ramifications, which has had a phenomenal growth in our post-war economy, presents a matter of first impression to this court.

The *per se* rule is applicable. It has been clearly delineated and firmly established by this Court. *International Business Machines Corporation* v. *U. S.*, 298 U. S. 131, 56 S. Ct. 701; *Morton Salt Co.* v. *G. S. Suppiger Co.*, 314 U. S. 483, 62 S. Ct. 402; *Times-Picayune Pub. Co.* v. *U. S.*,

345 U. S. 594, 73 S. Ct. 872; *Black* v. *Magnolia Liquor Company*, 355 U. S. 24, 78 S. Ct. 106; *International Salt Co.* v. *U. S.*, 332 U. S. 392, 68 S. Ct. 12.

It is clear that the Carvel system of operation involves the sale, loan or lease of patented and unpatented equipment as well as the use of trademarks, on condition that the dealer use same only in conjunction with Carvel mix and other equipment and supplies required to be purchased from Carvel, and no other. Such agreements constitute *per se* violations of § 1 of the Sherman Act when the party imposing the condition has a dominant position with respect to the tying product and a not insubstantial volume of interstate commerce is affected. *Northern Pacific Railway Company* v. *U. S.*, 356 U. S. 1, 78 S. Ct. 514.

The *Northern Pacific Railway Company* case defined "monopoly power" or "dominance" over the tying product as nothing more than "sufficient economic power to impose an appreciable restraint on free competition in the tied product" (pp. 11, 521). And it is established that a patent is sufficient to supply the requisite of "dominance" for the application of the *per se* rule of unreasonablness to tying arrangements.

Assuming, as the concurring opinion stated, that the patented items involved "cannot realistically be considered the 'tying product' or the focus of the arrangement", it is urged that the use of the Carvel trademark, found by Judge Lumbard to be the "principal feature of the Carvel franchise system", supplies the requisite economic power which this Court defined in the *Northern Pacific Railway* case. Nor can a license to use a trade name sanction unlawful restraints such as are here involved. *Dictograph Products, Inc.* v. *F. T. C.*, 217 F. 2d 821. And this Court has earlier held that a valid trademark licensing system may not be implemented by restraints of trade which extend beyond protection of the mark. *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593.

The protection of good will as a justification for tying arrangements has been firmly rejected. *International Salt Co., Inc.* v. *U. S.*, 6 F. R. D. 302 (aff'd 332 U. S. 392, 68 S. Ct. 12); *International Business Machines Corporation* v. *U. S., supra; Dictograph Products, Inc.* v. *F. T. C., supra.* The involvement of food or health considerations does not alter this principle. *Ethyl Gasoline Corp.* v. *U. S.*, 309 U. S. 436, 60 S. Ct. 618; *Automatic Canteen Co.* v. *F. T. C.*, 194 F. 2d 433; *Sylvania Industrial Corp.* v. *The Visking Corp.*, 132 F. 2d 947.

In this connection, we had urged upon the trial that the protection of the Carvel name could be validly accomplished through definition of specifications of standards for the different products used. In rejecting this, the trial court found "that the agreements indicate that Carvel would approve the use of accessory supplies from alternate sources of supply if an adequate check on standards could be maintained." This finding is *not* supported by the agreements and is completely erroneous.

Of particular significance in considering Carvel's intent and purpose to eliminate and foreclose competition is the franchise provision restricting the dealer from engaging in a similar business in the event of termination of his franchise. It is noteworthy that although the franchise granted the dealer a relatively small exclusive territory, the restriction against his engaging in a similar business after termination covered a radius of 25 miles. Since, once his franchise terminated, he would no longer use the Carvel name, he could not conceivably damage Carvel's trademark. Under such circumstances, the prohibition against engaging in a similar business in so large an area was an unreasonable restraint of trade and was obviously designed as such. The subject was treated in *Dictograph Products, Inc.* v. *Federal Trade Commission*, 217 F. 2d 821, where the court said at page 823:

> "There are various terms of the agreement which serve to implement the exclusive dealing features,

the most important of which is the following restrictive covenant which applies in case the agreement be cancelled by either party as would doubtless be the result of any persistent attempt by the distributor to sell the hearing aids of competitors.

21. In the event of the termination of this agreement by either party distributor expressly covenants and agrees that for a period of one year from the date of said termination the distributor will not directly or indirectly carry on or be engaged, employed or interested in any hearing aid business within the territory outlined in Paragraph 2 hereof * * *."

In passing, some comment should be made with reference to the last paragraph in the Court of Appeals' decision respecting the minimal damages involved. The record does not justify this passage since the trial proceeded solely on the question of liability and no effort was made to prove damages.

So far as price maintenance is concerned, it is firmly established that any fixing of prices by two or more persons violates Section 1 of the Sherman Act (except, of course, for "fair trade" agreements), *U. S.* v. *Socony Vacuum Oil Co.*, 310 U. S. 150, 60 S. Ct. 811; *U. S.* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 64 S. Ct. 805; *U. S.* v. *Bitz*, 159 F. Supp 80, and this is so whether the price fixing is at the wholesale or retail level. *Crane Distributing Company* v. *Glenmore Distilleries*, 267 F. 2d 343. And price fixing, absent authorizing statutes, is illegal *per se*. *U. S.* v. *Line Material Co.*, 333 U. S. 287, 68 S. Ct. 550.

We submit that the trial court misconceived and inhibited our efforts to prove this aspect of the case. We sought to present many documents from which a price fixing pattern might emerge, but the trial judge stated:

"You are not going to get it by just little drabs and drabs of evidence. You have to be able to prove

> that there was a contractual obligation with these franchise owners that they would sell only at a fixed price. If you do that these become irrelevant. If you don't do it, you haven't established your case" (emphasis supplied).

This was clearly error and prejudicial. For it is fundamental that the illegality of a price maintenance arrangement may be shown by a system of policy, combinations or cooperative efforts. *Armand Co.* v. *Federal Trade Commission*, 78 F. 2d 707. The Supreme Court held in *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 42 S. Ct. 150, which also involved "suggested" prices, that proof of illegal price maintenance needs no specific contract but may be shown by the defendant's methods in securing the cooperation of its dealers which are as effectual as agreements. And in the recently decided case of *U. S.* v. *Parke Davis and Company*, 362 U. S. 29, 44, 80 S. Ct. 503, 512, the court amplified the Beech-Nut doctrine and held that judicial inquiry will not stop with a search of the record for evidence of purely contractual arrangements.

The concurring opinion held inferentially that the restraints are valid because of "the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae". This completely overlooked the testimony of the same witness, to whom the Court of Appeals referred in support of its finding, that taste and texture could not be controlled since the dealer could dilute the product by not freezing or mixing it properly or by not using proper ingredients or in the desired proportions, and that in the final analysis, the quality depended upon the man doing the job in the store. Also ignored was the fact that Carvel did not manufacture and sell to the dealer any finished product of measurable standards of quality. Nor did any of the Carvel trademarks attach to any of the end products, as such, manufactured and sold by the dealer. Carvel merely supplied the ingredients and the end product was the creation of the dealer.

Conclusion

There can be no question but that the Carvel system has the capacity, tendency and effect to suppress competition in a particular line of commerce. The validity of the agreements involved, in view of the impact upon the business world of the franchise system, requires a searching analysis of that type of operation.

The Court of Appeals as well as the District Court apparently relied upon the supposed difficulty of providing detailed specifications to the dealers. However, the sole evidence in the record was the testimony that it was *merely* difficult to police the dealers. Contrariwise, the evidence did reveal that detailed specifications were in fact furnished to Carvel's suppliers and further reveals that Carvel was able to extensively police each dealer's operation. It follows, therefore, that if the restraints imposed were for the purpose of trademark or good-will protection, this result could have been accomplished by Carvel furnishing its dealers with the same specifications it had already furnished its suppliers.

In the famous *Standard Stations* case (337 U. S. 293, 69 S. Ct. 1051) this court stated (pp. 306, 1058):

> "The only situation, indeed, in which the protection of good will necessitate the use of tying clauses is where specifications for a substitute would be so detailed that they could not practicably be applied."

Thus, with the record devoid of evidence to bring this case within the foregoing exception, and with the admission that detailed specifications were in fact supplied, if only to the approved suppliers, there can be no justification for the restrictive provisions.

It is therefore respectfully urged that the judgment of the United States Court of Appeals for the Second Circuit should be reversed, and to that end the writ herein prayed for should issue.

Respectfully submitted,

SIDNEY W. ROTHSTEIN,
Attorney for Petitioners.

GREENFIELD, ROTHSTEIN & KLEIN,
350 Broadway,
New York 13, N. Y.

APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit, May 8, 1964

No. 96—September Term, 1963.

(Argued October 24, 1963 Decided May 8, 1964.)

Docket No. 28206

BERNARD SUSSER, *et al.*,
Plaintiffs-Appellants,

—v.—

CARVEL CORPORATION, CARVEL DARI-FREEZE STORES, INC., CARVEL STORES REALTY CORPORATION, *et al.*,
Defendants-Appellees.

AND EIGHT OTHER CASES,

Southern District of New York Civil File Numbers 150-212, 152-119, 152-120, 153-193, 60 Civil 63, 153-194, 60 Civil 1096, 60 Civil 1990, and 60 Civil 2042.

Before:

LUMBARD, *Chief Judge,*
MEDINA and FRIENDLY, *Circuit Judges.*

Appeals from judgments of the United States District Court for the Southern District of New York, Archie O. Dawson, *J.*, which dismissed the plaintiffs' complaints charging violations of the antitrust laws and fraudulent misrepresentations. 206 F. Supp. 636 (S. D. N. Y. 1963).

Affirmed.

Opinion of the United States Court of Appeals for the Second Circuit, May 8, 1964

SIDNEY W. ROTHSTEIN, New York, N. Y. (Joseph L. Klein, Greenfield, Rothstein & Klein, New York, N. Y., on the brief), *for plaintiffs-appellants Bernard Susser, et al.*

HERMAN L. WEISMAN, New York, N. Y. (Herbert F. Roth, Amen, Weisman and Butler, New York, N. Y., on the brief), *for defendants-appellees Carvel, et al.*

WILLIAM G. MULLIGAN, New York, N. Y., *for defendant-appellee Rakestraw's Dairy Products.*

JOHN A. WILSON, New York, N. Y. (Willard M. L. Robinson, Shearman & Sterling, New York, N. Y., on the brief), *for defendant-appellee H. P. Hood & Sons, Inc.*

IRVING L. WEINBURGER, New York, N. Y. (Albert L. Wigor, New York, N. Y., on the brief), *for defendant-appellee Eagle Cone Corporation.*

LUMBARD, *Chief Judge* (writing for the majority in part and dissenting in part):

The plaintiffs in nine actions which were tried together in the Southern District of New York appeal from the dismissal of their complaints which alleged violations of the antitrust laws and sought treble damages from the Carvel Corporation, a New York corporation which manufactures dairy and primarily soft ice cream products, its subsidiary organizations, certain of its individual officers and attorneys, and a number of its suppliers. The plaintiffs, former and present individual operators of Carvel franchise outlets in Massachusetts, Connecticut and Pennsylvania, also

charged the Carvel defendants with fraudulent misrepresentations in the franchise negotiations.

After a separate trial of the fraud charges, Judge Dawson, sitting without a jury, dismissed the complaints as to these charges on February 7, 1962. The issue of liability on the antitrust causes of action was tried separately before Judge Dawson without a jury. The plaintiffs alleged that Carvel had unlawfully fixed the prices of the retail products sold at the franchise stores and that the franchise agreements embodied tying and exclusive dealing arrangements violative of the Sherman and Clayton acts. The complaints also charged that the contracts between Carvel and the supplier defendants embodied concerted refusals to deal with the plaintiffs violative of the antitrust laws. In a pre-trial order the plaintiffs stipulated that they would rely solely upon "per se" violations of the antitrust laws as shown in certain written agreements and other documents. From a judgment which, with one exception,[1] dismissed the complaints against all the defendants on the ground that the plaintiffs had failed to prove violations of the antitrust laws, 206 F. Supp. 636 (S. D. N. Y. 1963), the plaintiffs appeal.

The Carvel Franchise System

Although the franchise operators conduct their stores as independent businessmen, through provisions in the franchise agreement Carvel is able to maintain a chain of 400 stores uniform in appearance as well as in operation. The dealer is obligated to conduct his business in accordance with a Standard Operating Procedure Manual (Manual) which governs in great detail the general operation of the store, including the types of products which may be offered for sale, the recipes for their preparation, the nature and

[1] Judge Dawson held invalid the pricing provisions of the pre-1955 franchise agreement.

placement of advertising displays in the store, the color of the employees' uniforms, and the hours when the store lights must be turned on. The stores are identical in design, each featuring the Carvel crown and cone trademark on a flat slanting roof, glass walls at its front, and the name "Carvel" on its sides in neon lights. This distinctive design is protected by a design patent. The ice cream, which is processed from a mix prepared from a secret formula, is dispensed from a patented machine, which bears the Carvel name or trademark. The paper containers, ice cream cones, and spoons all bear the Carvel name and in some instances are unique in design.

The Carvel chain of franchise stores has grown from approximately 180 in 1954 to approximately 400 at the time of trial in 1962. The stores are presently located throughout the eastern portion of the United States from Maine to Florida and as far west as Wisconsin. Their annual gross sales are from six to eight million dollars. Carvel's sales to the stores of supplies, equipment, and machinery reached a high point of $5,532,396 in 1957 and in 1960 totalled $4,460,689.

Special counsel retained by Carvel in 1955 for that purpose drafted a new form of the franchise agreement. The plaintiffs in four of the actions entered into franchise agreements prior to 1955; the plaintiffs in the remaining actions became franchisees after 1955. Both agreements and the corresponding Manuals must therefore be scrutinized. The new agreement effected two important changes. First, whereas under the earlier agreement the franchise dealer was obligated to sell Carvel produets at prices fixed by the parent organization, the new agreement explicitly provides that the dealer has the right to fix his own prices. Second, under the earlier agreement the dealer was obliged to purchase his entire requirements of supplies, machinery, equipment, and paper goods from Carvel or Carvel ap-

proved sources. The new agreement requires the purchase from Carvel or Carvel approved sources only of those supplies which are a part of the end product sold to the public and permits the dealer to purchase machinery, equipment, and paper goods from independent sources so long as his store is maintained in accordance with the Manual specifications.

PRICE-FIXING

It is undisputed that the pre-1955 Manual established "standard selling prices" to which the dealers were obligated to adhere. The pre-1955 franchise required the dealers "To maintain prices on products designated in, and as per Carvel Standard Operating Procedure and not to conduct any reduced price sales of these items without written consent from Carvel." Judge Dawson held that these price-fixing provisions were illegal and that the four plaintiffs who had entered into the earlier franchise were entitled to a trial on the issue of damages. No appeal was taken from this aspect of the judgment below.[2]

The revised franchise provides: "The dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the dealer." The appellants contend that notwithstanding this provision Carvel effectively continued to fix prices at which Carvel

[2] In accordance with Rule 54(b) of the Federal Rules of Civil Procedure Judge Dawson, finding no good reason for delay, directed the entry of judgments in all the actions, although damages were yet to be ascertained in four of the cases.

products were sold to the public and that Judge Dawson's finding to the contrary is clearly erroneous.

Even in the absence of express contractual provisions which evidence an unlawful scheme, a charge of unlawful price-fixing may be substantiated by proof of a course of conduct by which the seller or licensor effectively maintains control of the ultimate retail price at which a product is sold. *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922). The appellants direct our attention to the fact that six pages of the revised Manual continued to refer to "Standard selling price"; that in letters to several dealers Carvel emphasized that only 10¢ and 20¢ cones were prescribed by the Manual and that the minimum portions prescribed by the Manual were mandatory; that Carvel sought to have dealers report to it any deviation by other dealers from the requirements of the Manual; and that Carvel suggested that dealers seek its permission before conducting a sale at prices other than those established in the Manual. Moreover, the appellants emphasize the existence of a board of governors consisting of various dealers appointed by Carvel, the function of which is to make recommendations concerning the suggested retail selling price of Carvel products.

As Judge Dawson noted, the mere existence of a means whereby retail price levels are recommended is not sufficient to establish a violation of the Sherman Act, unless there is a showing of an attempt to enforce a price structure upon the retail tradesmen. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Protective Ass'n* v. *United States*, 268 U. S. 588 (1925). Here, the franchise provisions explicitly reserved to the individual dealer the right to set whatever price he desired. And, by contrast with the letters to which the appellants referred, Carvel introduced in evidence bulletins circulated to all the dealers as well as letters sent to several emphasiz-

ing that Carvel had changed its prior pricing policy and that each dealer now had the right to set his own prices, although Carvel did indicate that its suggested retail prices were based upon its own broad experience in customer sales.

Fred Vettel, Carvel's general manager since 1955, testified that the board of governors operated primarily as a medium for the interchange of ideas among a representative group of individual franchise dealers. He further stated that since sometime in 1957 Carvel had made available to the dealers advertising displays which left blank spaces for those dealers who wished to insert prices other than those suggested by the Carvel organization, although the appellants adduced evidence that on some occasions requests for such posters were refused.

In short, the evidence was contradictory on the question whether Carvel attempted to impose a binding price structure on the retail dealers. It is not the duty of this court to consider *de novo* the conflicting evidence and resolve this factual issue; rather, we must review the determination of the district court to determine whether or not it is clearly erroneous. See *Ruby* v. *American Airlines, Inc.*, 2d Cir., Docket No. 28473, February 14, 1964, pp. 998-1002; *United States* v. *National Ass'n of Real Estate Boards*, 339 U. S. 485, 494-96 (1950). There is much evidence to support Judge Dawson's finding of fact that Carvel did not engage in an unlawful price-fixing scheme, and we cannot say that Judge Dawson's conclusion was clearly erroneous.[3]

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[3] We thus need not decide whether the products allegedly the subjects of unlawful price-fixing were sufficiently a part of interstate commerce to sustain a charge of Sherman Act violation.

Opinion of the United States Court of Appeals for the Second Circuit, May 8, 1964

EXCLUSIVE DEALING AND TYING ARRANGEMENTS

The appellants maintain that the franchise agreements embody violations of the Sherman[4] and Clayton[5] acts insofar as they require the dealer to refrain from selling any non-Carvel product and insofar as they obligate the dealer to purchase directly from Carvel or from a source approved by Carvel his supply not only of the basic Carvel ice cream mix, prepared under a secret formula, but also certain other products used in either the preparation or

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[4] Section 1 of the Sherman Act, 15 U. S. C. § 1, provides:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . ."

Section 2, 15 U. S. C. § 2, provides:

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

[5] Section 3 of the Clayton Act, 15 U. S. C. § 14, provides:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease, or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia, or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

sale of the end product offered to the public. The requirement that the dealer sell solely Carvel products would, if taken alone, present an example of an exclusive dealing arrangement; the requirement that the dealer purchase not only Carvel mix but also certain other products would, if taken alone, present an example of a tying arrangement. Inasmuch as the Supreme Court has erected a much more stringent test of legality with which to measure tying arrangements than that which is applied to exclusive dealerships, we consider first the appropriate standard to be applied where both provisions are embodied in a single contractual relationship.

We can find no justification for treating the tying aspects of an agreement which embodies exclusive dealing aspects as well any differently than we would treat a tying arrangement alone. The fundamental economic evil in a tying arrangement deemed unlawful under the antitrust laws lies in the ability of a producer who possesses market dominance in one particular product to impose upon his vendee the obligation to purchase other products as to which the producer possesses no market dominance and the consequent foreclosure to other producers of the non-dominant products of such markets for their merchandise. Certainly the economic impact of such an arrangement is in no respect diluted by inclusion of provisions which restrict the vendee solely to the use or sale of the producer's products. We shall therefore measure the tying aspects of the Carvel franchise by the more stringent standard of legality established by the Surpreme Court and the exclusive dealing aspects by the more liberal standard.

As noted above, the pre-1955 franchise obligated the dealer to "purchase and use only standard Carvel approved printed paper goods, napkins, cones, extracts, spoons, and all other Carvel products at standard market prices." The post-1955 franchise requires the dealer to purchase from

Carvel or approved sources his entire requirements of all items sold as a part of the retail product but permits the dealer to purchase machinery, equipment, and paper goods from sources other than Carvel so long as the operation is maintained in accordance with the Manual specifications.[5a]

The Tying Arrangements

Tying arrangements have been given short shrift under the antitrust laws. *International Business Machine Corp.* v. *United States*, 298 U. S. 131 (1936); *International Salt Co.* v. *United States*, 332 U. S. 392 (1947); *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953); *Northern Pacific Railway Co.* v. *United States*, 356 U. S. 1 (1958); *United States* v. *Loew's, Inc.*, 371 U. S. 38 (1962). See generally Turner, The Validity of Tying Arrangements Under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958). Yet it seems clear that in compelling circumstances the protection of goodwill, as embodied for example in a valuable trademark, may justify an otherwise invalid tying arrangement. But "[t]he only situation, indeed, in which the protection of good will may necessitate the use of tying clauses is where specifications for a substitute [for the tied product] would be so detailed that they could not practicably be supplied." *Standard Oil Co.* v. *United States*, 337 U. S. 293, 306 (1949). The threshold question is thus whether the Carvel franchise embodies a tying arrangement and, if so, whether that arrangement can be justified as necessary for the protection of Carvel's goodwill.

A tying arrangement may be defined as an agreement under which the vendor will sell one product only if the purchaser agrees to buy another independent product as

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[5a] The post-1955 agreement provides that "[i]n the event that the Dealer desires to purchase his printed goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards."

well. Two types of economic injury characteristically arise from such an arrangement: first, foreclosure to the vendee of alternate sources of supply for the second, or tied, product; and second, foreclosure of possible market outlets to other competing suppliers of the tied product. The source of this injury—and the fundamental element which requires that such arrangements be deemed illegal—lies in the vendor's "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product." *Northern Pacific Railway Co.* v. *United States, supra,* at p. 6. Such power may be found either in the vendor's dominance of the market in the tying product or in its uniqueness or particular appeal to the consumer. *United States* v. *Loew's, Inc. supra,* at p. 45.

My brothers would affirm the judgment of the district court in all respects. With regard to the allegations of unlawful tying arrangements, they reason that the plaintiffs limited themselves by pre-trial stipulation to reliance solely on "per se" violations of the antitrust laws and since they failed to establish Carvel's market dominance and that a substantial amount of commerce is affected they have failed as well to make out a *per se* violation of the antitrust laws. I cannot agree.

The stipulation, in relevant part, states only that the plaintiffs will rely on *per se* violations and that their proofs will be limited to the written franchise agreements, other documents supplementary thereto, and the testimony of two individuals taken prior to trial, one of whom was Fred Vettel, Carvel's general manager. The effect of this stipulation seems clear to me. The plaintiffs agreed that they would go no further than the documentary evidence alluded to in attempting to make out their claims of antitrust violation. The only question is whether the plaintiffs in fact introduced sufficient evidence to make out an antitrust violation by the Carvel defendants. I think they did.

The nature of their stipulation and the label they gave it is wholly immaterial to that question. I cannot see what can possibly turn on the fact that the plaintiffs limited themselves to what the stipulation termed "per se violations."

The court's focus must be entirely on the state of the record. The crucial question is whether the record satisfies the requirements of proof of an antitrust violation. Each element of a tying arrangement must be considered in turn.

Does Carvel possess the requisite economic leverage? Despite the absence in the record of substantial economic data, in the light of the Supreme Court's decision in *United States* v. *Loew's, Inc., supra,* I believe that such power may be presumed from the use of the Carvel trademark as the principal feature of the Carvel franchise system. In *Loew's,* the Court declared that "when the tying product is patented or copyrighted . . , sufficiency of economic power is presumed." 371 U. S. at 45 n. 4. I can find little reason to distinguish, in determining the legality of an allegedly unlawful tying arrangement, between the economic power generated by a patent or copyright on the one hand and that generated by a trademark on the other. In all three cases, the Congress has granted a statutory monopoly which places in the hands of the owner the right, within the limitations of federal law, to do as he will with the protected product. The value of the patent, copyright or trademark is, of course, directly proportionate to the consumer desirability of the protected product.

I can find no reason not to extend this presumption of economic power to trademarks.[6] In any event, the claims

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[6] The protection given to trademarks is in some respects even more extensive than that given either patents or copyrights. The duration of a trademark, for example, may, during continued use, be extended beyond 20 years without limit of time, 15 U. S. C. §§ 1058-59, whereas a patent expires after 17 years, 35 U. S. C. § 154, and a copyright after 28 years, subject to a renewal period of 28 years, 17 U. S. C. § 24.

which Carvel itself proffers lend added weight to the presumption, for Carvel's claim of economic justification is founded upon the substantial value of its trademark and the necessity for contractual restraints upon its dealers to protect that value. No doubt the recent growth of the Carvel chain from 180 to 400 stores has been attributable in great measure to the increasing value of the Carvel trademark in terms of consumer appeal and the concomitant increase in economic power generated by that trademark. The essential element in the Carvel franchise is the trademark license agreement which permits the dealer to display, label and sell its retail products as "Carvel" products. To reinforce its basic trademark Carvel also possesses some nine design patents covering its building structure, advertising displays, freezers and other apparatus, three patents covering machinery and some twenty trademarks in varying forms for use with the wide variety of products which are merchandised at the franchise stores.[6a] It is the lease or license of the trademark itself, buttressed by this array of patents and subsidiary trademarks, to which are tied the other products.

Having concluded that the Carvel trademark presumptively generates sufficient economic power, we must consider two arguments advanced to support the proposition that the Carvel franchise in any event does not embody an unlawful tying arrangement within the provisions of the Clayton Act. First, it is contended that section 3 of that act condemns only agreements which obligate the purchaser not to "use or deal in the goods . . . of a competitor or competitors of the lessor or seller," and that since Carvel does not compete

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[6a] Exhibit C-2, introduced by the Carvel defendants, is comprised of these 32 patents, design patents, and trademarks, including, for example, design patent #169,055, issued on March 24, 1953, covering the building structure; patent #2,731,925, issued on January 24, 1956, covering the one piece barrel end and dispenser tip; and design patent #184,983, issued April 28, 1959, covering a top unit for vending motor vehicles.

with suppliers of cones, toppings, extracts, ice cream mix and so forth there has been no improper foreclosure of competition. Generally, Carvel's suppliers accept orders directly from the dealers, bill the dealers and deliver directly to them rather than to Carvel. However, the transaction is cast in the form of a sale directly to Carvel which in turn resells the items to the individual dealers, the suppliers acting as Carvel's agents for payment and delivery. Carvel sets the prices at which these items are sold to the dealers. From the point of view of the legal form adopted, then, it is clear that Carvel does compete with other suppliers of these products. Moreover, there is little difference in economic impact between Carvel's purchasing and reselling these supplies and Carvel's production of these items in the first instance.

With regard to the foreclosure to other suppliers of the Carvel franchise stores as possible market outlets, it must be conceded that vigorous competition would probably exist among such suppliers to secure the initial contract with the Carvel organization. Nevertheless, the nature of this competition must be substantially different from that which would otherwise prevail. In view of the leverage which the Carvel corporation wields in supervising the supplying of some 400 retail outlets, competition will most likely take the form of substantial price concessions and the concomitant inability of smaller suppliers effectively to compete with larger producers who are capable of meeting Carvel's price and service demands.

Of equal significance is the economic impact of the prevailing arrangement in terms of foreclosure to the individual franchise stores of the opportunity to deal with individual suppliers. While under the franchise the dealer may enjoy lower prices on some items,[7] Carvel undoubtedly

[7] For example, the evidence indicated that an ice cream cone similar to that for which the dealers paid $4.80 per 600 to Carvel was listed on Eagle Cone Corporation's wholesale price list at $5.60 per 600, in lots of 25 cases or more.

reaps some economic benefit from its status as an intermediary.[8] There is no indication whether or not the dealers, either individually or in combination, could secure lower prices and better service from local producers of the same products. In short, in order to secure the benefits of employing the Carvel name on his retail products, the dealer has been forced to surrender his right to negotiate with suppliers of his own choice on matters such as price, delivery and other aspects of a contract of sale. Where such a surrender may be traced to the economic leverage of the other party, arising from its trademark, the elements of an unlawful tying arrangement have been established. Certainly the amount of commerce here involved is not insubstantial, in light of Carvel's sales to the franchise dealers in 1960 alone of $3,965,923 in ingredients and other supplies.

The second argument advanced in support of the proposition that the Carvel franchise does not embody a tying arrangement is that we are dealing not with a series of individual products tied together for purposes of sale, but rather with one unified product, that is the Carvel product which is ultimately consumed by the public. I do not agree. Carvel sells supplies as distinct items in large quantities—for example, ten gallons of mix, ten gallons of chocolate syrup, and so forth. Carvel itself purchases these supplies as distinct items from a wide variety of suppliers who in turn make individual deliveries to the franchise outlets. By their very nature it seems clear that there is no reason to treat these separate products as one unified product although to the ultimate consumer of an ice cream cone or a sundae they would seem to be one.

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[8] For example, the evidence indicated that Carvel charged the dealers $10.00 per thousand for ice cream cones which it purchased for $9.50 from the cone manufacturers.

The plaintiffs having proved the essentials of a tying arrangement proscribed by the Clayton Act, the burden fell upon Carvel to justify the arrangement as reasonably necessary to protect its trademark. While it is clear that some quality control is essential for the protection of Carvel's goodwill—if not required by law for a proper trademark licensing agreement, see *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America*, 167 F. 2d 484 (Ct. of Cust. and Pat. App. 1948); *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953); *Morse-Starrett Prod. Co.* v. *Steccone*, 86 F. Supp. 796 (N. D. Calif. 1949)—the justification for this control requires proof that the specifications for products to substitute for those offered by Carvel would be so complex and detailed as to make it impracticable for Carvel to establish such specifications. See *Standard Oil Co.* v. *United States*, *supra*, at 306.

I find the record with respect to justification of Carvel's control to be unsatisfactory and inconclusive. The evidence before Judge Dawson was for the most part documentary. With the exception of the self-serving statement in the franchise agreement that the dealer's obligation to purchase only from Carvel those items which are part of the end product is necessary "[i]n order to safeguard the integrity of Carvel's trade-marks," the documents are of little value on the issue of trademark justification. Vettel, Carvel's general manager, testified that the various toppings and other garnishments are made by the suppliers to Carvel's specifications, although not under a secret formula as is the basic ice cream mix. Vettel stated that it would be "impossible" to police the individual stores; yet he conceded, as did a representative of H. P. Hood & Sons, a supplier to Carvel of ice cream mix, that the toppings and garnishments sold by Carvel to the dealers could be purchased elsewhere on the market.

In light of this sparse showing, I am unable to find sufficient support for Judge Dawson's conclusion that the tying arrangement was justified by the necessity for Carvel to establish quality controls to protect its trademark. My brothers suggest the difficulty of "controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae." Yet, since Carvel itself manufactures none of the ingredients sold to the dealers, it has itself apparently surmounted the difficulty of verbalizing the recipes for the proper preparation of its ingredients. It is especially noteworthy that in *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714 (D. Kans. 1962), it was established that Dairy Queen, which operates a nationwide chain of some 3,400 soft ice cream franchise stores quite similar to Carvel's, does not require that its dealers purchase mix, toppings, or other garnishments directly from it or from approved sources, but instead it establishes specifications to govern such items and enforces these by means of periodic inspection of its franchise stores. This fact is by no means conclusive of the ability of Carvel, a somewhat smaller chain, to maintain its own standards of quality through similar controls, since the circumstances may differ, but it negates the proposition that it is logical and reasonable to infer—in the absence of proof more compelling than the mere self-serving statement of Carvel's own general manager—that it was reasonable and necessary for Carvel to embody a tying arrangement into its franchise agreement. Dairy Queen poses in striking contrast the insufficiency of the evidence adduced by Carvel to support its claim.

The antitrust aspects of the plaintiffs' claims were tried more or less as the aftermath of the far more lengthy fraud and deceit aspects of the case. Apparently because of all the time already spent in litigating the other issues, coun-

sel were urged by the district court to limit their proofs in the antitrust phase of the case essentially to documentary evidence, and this may explain as well the plaintiffs' reliance solely on "per se" violations of the antitrust laws. With the case in this posture, I would think it best to remand the cause to the district court for a further hearing limited to the issue of justification. If Carvel could establish its claim the result ultimately would be the same. If Carvel were unable to do so the plaintiffs would have sufficiently established all the elements of an unlawful tying arrangement.

The Exclusive Dealing Arrangements

As we have noted, our application of the stricter standard of legality established by the Supreme Court to the tying aspects of the Carvel franchise does not preclude us from applying the more flexible standard established by the Court for exclusive dealing arrangements to the requirement in the franchise that the dealer sell at retail only Carvel or Carvel approved products. The plaintiffs maintain that this provision erects an unlawful exclusive dealership violative of the antitrust laws. We do not agree.

In *Tampa Electric Co.* v. *Nashville Co.*, 365 U. S. 320 (1961), the Supreme Court held valid a contract between Tampa, a public utility, and Nashville, a medium sized coal company, which obligated Nashville to supply Tampa's entire requirements of coal over a twenty-year period—one form of an exclusive dealing arrangement. After discussing the necessity of delineating the relevant line of commerce and the geographical market, the Court noted that requirements contracts "have not been declared illegal *per se*" and stated that in determining whether or not the contract in issue would substantially lessen competition the courts must take into account "the relative strength of the parties, the proportionate volume of commerce involved

in relation to the total volume of commerce in the relevant market area, and the probable immediate and future effects which pre-emption of that share of the market might have on effective competition therein." 365 U. S. at 329. The Court further emphasized the significance of the possible economic justification for the accused arrangement, in light of the legitimate reasons for employing such a device.

Lacking economic data sufficient to meet the standard thus established in *Tampa Electric,* the appellants here urge that the Supreme Court's decision in *Standard Oil Co.* v. *United States, supra,* is controlling and that they need prove only that "competition has been foreclosed in a substantial share of the line of commerce affected." 337 U. S. at 314. We need not comment on whether the appellants could sustain their allegations under the doctrine enunciated in *Standard Oil,* for it seems indisputable that in *Tampa Electric* the Court deviated from the more rigorous and inflexible rule it had established in *Standard Oil* and erected criteria which demand close scrutiny of the economic ramifications of an exclusive dealing arrangement in order to determine the probable anti-competitive effects of such a device. See Bok, The Tampa Electric Case and the Problem of Exclusive Arrangements Under the Clayton Act, 1961 Sup. Ct. Rev. 267, 281-85. We find it plain that the appellants have failed to bear this burden. Instead of introducing evidence to establish the economic effects of the Carvel franchise structure, they merely protest that anti-competitive effects may be inferred solely from the existence of such a network of exclusive dealerships. But the whole tenor of *Tampa Electric* does not permit adherence to such a stringent standard of legality.

In any event, we need not rely solely upon the appellants' failure to adduce concrete evidence concerning the relevant line of commerce and geographical market and

the probable anticompetitive effects of the Carvel arrangement. For in terms of at least one factor which the Supreme Court deemed significant in *Tampa Electric*—that of economic justification—the Carvel exclusive dealership arrangement withstands any attack on its legality.

As Judge Dawson found, "the cornerstone of a franchise system must be the trademark or trade name of a product." The fundamental device in the Carvel franchise agreement itself is the licensing to the individual dealer of the right to employ the Carvel name in his advertising displays, on the products he sells, and on the store itself. The stores are uniform in design as well as in the public display of the ice cream machinery employed, the placement of advertising displays, and the products offered for sale. The requirement that only Carvel products be sold at Carvel outlets derives from the desirability that the public identify each Carvel outlet as one of a chain which offers identical products at a uniform standard of quality. The antitrust laws certainly do not require that the licensor of a trademark permit his licensees to associate with that trademark other products unrelated to those customarily sold under the mark. It is in the public interest that products sold under one particular trademark should be subject to the control of the trademark owner. See *E. I. du Pont de Nemours & Co.* v. *Celanese Corp. of America, supra; Arthur Murray, Inc.* v. *Horst, supra; Morse-Starrett Prod. Co.* v. *Steccone, supra.* Carvel was not required to accede to the requests of one or another of the dealers that they be permitted to sell Christmas trees or hamburgers, for example, which would have thrust upon Carvel the obligation to acquaint itself with the production and sale of these items so as to establish reasonable quality controls.

Nor do the antitrust laws proscribe a trademark owner from establishing a chain of outlets uniform in appearance and operation. Trademark licensing agreements requiring the sole use of the trademarked item have withstood attack

under the antitrust laws where deemed reasonably necessary to protect the goodwill interest of the trademark owner, see *Denison Mattress Factory* v. *The Spring-Air Co.*, 308 F. 2d 403 (5 Cir. 1962); *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7 Cir. 1935), and such agreements certainly are not unlawful *per se* under the antitrust laws. *Bascom Launder Corp* v. *Telecoin Corp.*, 204 F. 2d 331 (2 Cir. 1953). Judge Dawson was fully warranted in concluding that in the context of the entire Carvel franchise system the requirement that no non-Carvel products be sold at the retail level is reasonably necessary for the protection of Carvel's goodwill.

THE SUPPLIER CONTRACTS

The appellants maintain that the agreements between Carvel and its various suppliers of ice cream mix, cones, and paper products are violative of the antitrust laws insofar as they obligate the suppliers not to deal directly with the individual dealers but solely with Carvel and not to sell to the dealers any merchandise other than that approved by Carvel. We disagree.

With regard to Carvel's contracts with Hood and Rakestraw, which produced Carvel ice cream mix in accordance with a secret formula which they pledged not to divulge, it seems perfectly clear that as the possessor of a secret formula for its ice cream mix Carvel enjoyed the right to sell it to whomever it chose, and this right was not diluted by its agreement with Hood and Rakestraw to produce the mix. Carvel was free to insist that Hood and Rakestraw produce the mix solely for Carvel and subject to Carvel's wishes as to its disposition.

As for the provision in the contracts between Carvel and Hood, Rakestraw, Eagle, a cone manufacturer, and Mohawk, a manufacturer of paper products, that the sup-

pliers would not sell non-Carvel products to the individual dealers, we find no merit in the plaintiffs' claims. Carvel cannot be considered in competition with these suppliers from whom it purchases Carvel supplies, and such an agreement not to deal, even if established, when effected by non-competing enterprises is not illegal. See, e.g., *Packard Motor Car Co.* v. *Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), cert. denied, 355 U. S. 822 (1957). Moreover, the plaintiffs failed to prove that they were foreclosed from alternate sources of supply or indeed that the supplier defendants themselves had been requested to make sales to the dealers and had refused.

Accordingly, the judgments of the district court are affirmed.

FRIENDLY, *Circuit Judge*, with whom MEDINA, *Circuit Judge*, joins:

Concurring with most of Chief Judge Lumbard's opinion, Judge Medina and I do not consider that a remand as to the claim with respect to the "tied" purchases of flavoring, toppings and cones is either required or warranted in the light of the pre-trial order to which plaintiffs agreed. The relevant portion of this order is as follows:

> "4. That plaintiffs agree that they are relying solely upon alleged *per se* violations of the antitrust laws and make no claim other than that their evidence will establish *per se* violations of the antitrust laws.
>
> "5. Plaintiffs' evidence at the trial on the issue of liability will be limited to (a) written agreements entered into between the Carvel defendants and the plaintiffs, and other documents supplementary thereto or explanatory thereof, (b) written agreements between the Carvel defendants and the supplier de-

> fendants, and other documents supplementary thereto and explanatory thereof, and (c) testimony heretofore taken of a Mr. Vettel and a Mr. Bittner."

It could hardly be plainer that plaintiffs were confining themselves to claims of violation of the antitrust laws which, as they thought, could be sustained without other market data than the meagre amount contained in the documents offered.

In agreeing to the pre-trial order, plaintiffs may have been relying on the inclusion of tying arrangements in the list of *per se* violations in *Northern Pacific Ry.* v. *United States,* 356 U. S. 1, 5 (1958). But, as that opinion makes clear, not every tying arrangement is illegal *per se.* Tying arrangements "are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of commerce is affected." 356 U. S. at 6. See also *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 608-09 (1953). More recently the Court has said that tying arrangements "may fall" in the category of *per se* violations, "though not necessarily so." *White Motor Co.* v. *United States,* 372 U. S. 253, 262 (1963).

Here the facts to which plaintiffs were limited by the pre-trial order showed neither that Carvel had "sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product" nor that "a not insubstantial amount of commerce is affected." Indeed, such figures as exist would prove the contrary. In 1960 there were in New York, Connecticut and Massachusetts, 250 Carvel dealers out of a total of 125,000 outlets where ice cream cones could be purchased—amounting to one fifth of one per cent of the outlets and apparently doing about one per cent of the busi-

ness.[1] The other large Carvel states are New Jersey and Pennsylvania; the balance of a 1960 total of 400 Carvel dealers were scattered at one time over as many as 8 or 9 states from Maine to Florida and as far west as Wisconsin. These dealers competed not only with similar chains—Dairy Queen, Tastee Freez, Dari-Delite, King Kone, Dari-Isle, and others, with chains and independents utilizing mobile units, with chain stores and operations such as Howard Johnson, and with the ubiquitous corner drug-store. Although Carvel's aggregate sales are "not insubstantial," the totals shed no light on the amount of the "tied" sales here complained of, which common sense tells us must be a minor part.[2] The figures in footnotes 1 and 2 give some indication of the "insubstantiality" of the commerce affected even under the rather narrow test indicated by dictum in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 330 (1962), especially with reference to the cones, whose tie-in was hardest to justify in terms of quality control. Not only was the amount of commerce in these not consequential, but any damage to the plaintiffs was even less so. Eagle Cone's billings to Carvel averaged $460 per dealer per year, and Carvel's mark-up was slightly over 5% or about $25 per dealer;[3] whether the dealers suffered even that much dam-

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[1] The Carvel sales of Eagle Cone, which supplies all the cones for Massachusetts, Connecticut and New York, averaged $115,000 per year—about 1% of the total sales of cones in the three states.

[2] There are figures which indicate that 1960 sales of all "ingredients" other than mix to all dealers amounted to $1,354,590—or an average of less than $3,400 per dealer per year; the record does not make it clear whether all these "ingredients" were tied. Two-thirds of the figure of $3,965,923 in Chief Judge Lumbard's opinion constitute sales of the Carvel secret formula mix which surely could legally be tied to the Carvel trade-mark if that mark was to retain its significance, as he concedes.

[3] There was evidence that one of the plaintiffs had purchased $621 worth of cones in the big year, 1959; Carvel's mark-up on these would have been around $30.

age is questionable since the price Carvel charged them was less than they could have obtained if they bought in smaller quantities than Carvel, see fn. 7 to Chief Judge Lumbard's opinion. And, of course, it remained open to competing suppliers to bid for the Carvel business by soliciting that company—in itself an important contrast with cases where the tied item is produced by the seller.

Our brother Lumbard thinks the first of the deficiencies in proof as to economic power was remedied by Carvel's license of a package of trade-marks, design patents relating to the shape of the building etc., and a patented freezing and dispensing machine. We cannot agree. In the first place, the patented items cannot realistically be considered the "tying product" or the focus of the arrangement. Whatever has been said about the evils of "ties" to patented or copyrighted items is meaningful only in the situation where the desirability of the patented item is what motivates the purchaser to make further commitments or to give up some liberty of choice as to other products. See, e.g., *United States* v. *Loew's Inc.*, 371 U. S. 38, 45 (1962). In this case, the patented items appear to have been virtually without motivating significance in bringing about the agreement. The true tying item was rather the Carvel trade-mark, whose growing repute was intended to help the little band of Carvel dealers swim a bit faster than their numerous rivals up the highly competitive stream. There may, of course, be cases where a trade-mark has acquired such prominence that the coupling of some further item to its license would constitute a *per se* violation; but such a trade-mark would satisfy the market-dominance test of *Times-Picayune*, and *Northern Pacific*. The figures show that Carvel is not such a mark.

Tying arrangements differ from other *per se* violations, such as price-fixing, *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927), in that they can be justified on occasion, as by proof that "the protection of goodwill may

necessitate" their use "where specifications for a substitute would be so detailed that they could not practicably be supplied," *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293, 306 (1949). Since the value of a trade-mark depends solely on the public image it conveys, its holder must exercise controls to assure himself that the mark is not shown in a derogatory light. The record affords no sufficient basis for upsetting the finding of the District Judge that "To require Carvel to limit itself to advance specifications of standards for all the various types of accessory products used in connection with the mix would impose an impractical and unreasonable burden of formulation . . ." Although instances of impossibilty of control through specification may indeed be rare in cases involving the proper functioning of mechanical elements of a machine, see *International Business Machines Corp.* v. *United States*, 298 U. S. 131, 139 (1936); *International Salt Co.* v. *United States*, 332 U. S. 392, 397-98 (1947); Turner, The Validity of Tying Arrangements under the Antitrust Laws, 72 Harv. L. Rev. 50 (1958); but see *Dehydrating Process Co.* v. *A. O. Smith Corp.*, 292 F. 2d 653 (1 Cir.), cert. denied, 368 U. S. 931 (1961); *United States* v. *Jerrold Electronics Corp.*, 187 F. Supp. 545 (E. D. Pa. 1960), aff'd *per curiam*, 365 U. S. 567 (1961), such cases are scarcely relevant to the problem of controlling something so insusceptible of precise verbalization as the desired texture and taste of an ice cream cone or sundae; that Carvel was able to specify this to its source of supply, whose product it regularly checked, does not show that administration could be confided to 400 dealers. Furthermore in most states Carvel would risk liability to anyone injured by a foreign substance in the frozen mix, see ALI, Restatement (Second), Torts 402A (Tent. Draft No. 7, 1962); although it might not be so with respect to ingredients purchased from suppliers of the dealer's own choosing, the difficulties of proof

are such that it is entitled to insist on products in which it has complete confidence. Vettel's testimony that the success of the enterprise required distinctive flavorings of uniform quality and that he considered it impracticable to handle the problem by specification and policing was sufficiently reasonable and persuasive that the judge was entitled to credit it, whether or not one of us would agree.[4] We see little force in the fact that a competitor, which licenses only freezing machines and the trade-mark and does not sell a mix made by a secret formula, is satisfied with less exacting provisions. See *Engbrecht* v. *Dairy Queen Co.*, 203 F. Supp. 714 (D. Kan. 1962). Moreover, as Vettel also explained, by packing the flavoring in tins or bags that contain exactly the amount required for a 10-gallon can of mix, Carvel encouraged the dealers to use an adequate quantity and provided an automatic control. Finally there is a limit to the amount of inspecting feasible when each dealer purchases an average of less than $12,000 a year of Carvel products (including equipment) and sells in 10¢ and 20¢ units.

Even were we to consider the patented machines and design patents to be a relevant part of the tying arrangement, the *Northern Pacific* opinion ruled out the idea, thought by some to have been implicit in earlier opinions, that proof of the license of a patented device sufficed *semper et ubique* to show the market dominance required to render a tying arrangement a *per se* violation.[5] In doing

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[4] Vettel testified that one of the specifications to the manufacturer was that certain fruits be purchased at crop site; we are at a loss to understand how this could be policed by inspection on the dealer's premises.

[5] "In arriving at its decision in International Salt the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful *despite* the fact that the tying item was patented, not because of it." 356 U. S. at 9.

so it appropriately recognized the facts of business life. The society of patents is not egalitarian. As had been well said three years earlier, although with some dissent, in the Report of the Attorney General's Committee to Study the Antitrust Laws (1955), 238:

> "The patent may be broad and basic, in which event the economic power incident to the patent makes the tying clause illegal. On the other hand, the patent may be narrow and unimportant, in which event it may confer virtually no real market power. Accordingly, where the tying product is patented, the patentee should be permitted to show that in the entire factual setting, including the scope of the patent in relation to other patented or unpatented products, the patent does not create the market power requisite to illegality of the tying clause."

Indeed, the statement in *Northern Pacific* had been anticipated by the remark in *Standard Oil Co. of Calif.* v. *United States, supra,* at 307, that a patent is "*prima facie* evidence" of market control—evidence which was clearly rebutted here. Although there is language in *United States* v. *Loew's, Inc., supra,* at 44-48, which lends support to a theory that the mere existence of a patent of any description is not merely *prima facie* but irrebuttable evidence of market control, we find it hard to believe that the Court would thus have obliquely reversed the position taken in *Northern Pacific,* a position underscored by Mr. Justice Harlan's remarks in dissent, 356 U. S. at 17-19; the language rather must be read in the context of the Court's previous proscription of block-booking of motion picture films in *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131, 156-59 (1948), see 371 U. S. at 48. There is scant analogy between unique "hit" movies, or the tabulating and computing machines in *International Business Machines Corp.* v. *United States, supra,* as to which the defend-

ant had but one smaller competitor, or the salt-processing machines in *International Salt Co.* v. *United States*, 322 U. S. 392 (1947), and Carvel's dispensing machine by which, along with the rest of its package of distinctive devices, it had gained only 1% of the ice cream cone market in the area of its heaviest concentration, see fn. 1.

The triviality of whatever financial hardships the plaintiffs may have suffered as a result of these allegedly illegal contracts explains why they were willing to limit themselves to *per se* violations rather than incur the expense of assembling market data to gain what at best would be a negligible recovery. They have had two trials, one in which they were defeated in their claim of fraud, with a transcript of nearly 4,000 pages; we see no sufficient reason to order a third.

APPENDIX B

Opinion of Dawson, *D. J.*

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

DAWSON, *D. J.*:

I. GENERAL NATURE OF THE ACTIONS.

These are nine separate cases which were consolidated for trial. By consent of the parties the trial was held without a jury.

The plaintiffs in all cases are persons who are or were operators, under franchise agreements, of Carvel Dari-Freeze Stores at which "soft" ice cream was sold. Defendant Carvel Corporation and its subsidiaries issued the franchises, sold the basic equipment needed for operation of the stores and performed other related functions.[1] The other corporate defendants in the actions are the suppliers of various products such as ice cream mix, cones and paper goods used in connection with the dispensing of soft ice

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[1] The following subsidiaries of Carvel Corporation, a New York corporation, are defendants in these cases: Carvel Stores of New York, Inc., a New York corporation; Carvel Dari-Freeze Stores, Inc., a New York corporation; Carvel Stores Realty Corporation, a New York corporation, now known as Chain Locations of America, Inc.; Carvehicle Corporation, a New York corporation; and Carvel Stores of Pennsylvania, a Pennsylvania corporation. The name "Carvel" is used in this opinion as a general term of reference for any or all of the foregoing companies.

cream.[2] Also named as defendants were certain individuals who are or were officers or employees of Carvel.[3]

The complaints in each of the cases set forth two fundamental causes of action. The first cause of action, based on a claim that the plaintiffs were induced to enter into their franchise agreements on the basis of certain fraudulent misrepresentations made by Carvel, was previously tried in a separate trial. The opinion of the Court which decided the fraud and deceit causes of action adversely to the plaintiffs was handed down on February 7, 1962. The present opinion relates to the second fundamental cause of action set forth in the complaints which claims treble damages for alleged violations of the antitrust laws on the part of the Carvel and the supplier defendants.

By the consent of all parties, as embodied in Pre-Trial Order No. 5, dated February 7, 1962, it was provided that a joint trial of the issues of liability under the antitrust laws be held, that the issue of liability be tried separately from the issue of damages, that plaintiffs were relying solely on alleged *per se* violations of the antitrust laws and that plaintiffs' evidence on the issue of liability would be limited to written agreements between the Carvel de-

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[2] The non-Carvel corporate defendants consist of the following companies: Eagle Cone Corporation, a New York corporation; H. P. Hood & Sons, Inc., a Massachusetts corporation; Mohawk Container Company, Inc., a New York corporation; and Rakestraw's Dairy Products, Inc., a Pennsylvania corporation. The non-Carvel corporate defendants are referred to in this opinion as the supplier defendants.

[3] The actions as against these individuals, Thomas Carvel, Fred Vettel, Jr., George P. Clark, Robert J. Shallis, Agnes Carvel, Darrow Mutt, Ann M. McHugh, Stanley W. Townsend, Bruce Carvel, Mildred Arcadipane and Richard A. Cerosky, were dismissed by the Court on motion at the end of the case on the ground that no basis for any individual liability had been shown by the plaintiffs' evidence. The actions were also dismissed against Philip Agree and Arthur Marciante, former attorneys for Carvel.

fendants and plaintiffs and other documents supplementary thereto or explanatory thereof, as well as written agreements between Carvel defendants and the supplier defendants and other documents supplementary thereto and explanatory thereof. At the trial, which was held in March, 1962, both sides relied primarily on documentary evidence to establish their case.

II. Allegations of Unlawful Practices.

In regard to the antitrust causes of action the complaints all contain certain common allegations. They allege that the defendants entered into an understanding and agreement during the period encompassed by the complaint and prior and subsequent thereto whereby:

1. The supplier defendants refused to sell their respective products direct to the Carvel franchise operators but would sell only through Carvel.

2. The Carvel defendants designed the franchise agreement so as to obligate and compel their franchise operators to deal solely and only with the supplier defendants.

3. The franchise operators were forbidden to deal in "competitive products," and

4. The operators were required to sell their products to the public at prices fixed by Carvel.

Rephrased in standard antitrust terminology, the complaint apparently alleges, as to the supplier defendants, a boycott under which they declined to make direct sales to the franchise operators. As to the Carvel defendants they are seemingly charged with (1) participation in the conspiratorial boycott against direct sales, (2) requiring, as a condition of obtaining the franchise and purchasing equip-

ment, the use of the supplier defendants' products to the exclusion of the suppliers' competitors (tie-in), (3) forbidding the franchise operators from selling other than Carvel approved products (exclusive dealing), and (4) price fixing. These allegations will be taken up in order following a general discussion of the nature of the Carvel operation.

III. Nature of the Carvel Operation and the Franchise System.

Thomas Carvel, an individual defendant in some of the actions and president of the Carvel Corporation, went into the ice cream business in 1934. Over the succeeding years Mr. Carvel developed a freezer for dispensing "soft" ice cream, an ice cream mixture about the consistency of frozen custard. About 1948 the business established by Mr. Carvel had grown so substantially that two corporations, Carvel Corporation and Carvel Dari-Freeze Stores, Inc., were organized for the purpose of issuing franchises and selling freezers for the operation of soft ice cream stores under the Carvel name.

Thereafter, while the Carvel corporations operated some stores directly, most of their business related to the franchise operation. Each of the plaintiffs entered into agreements for the operation of a franchised Carvel Dari-Freeze ice cream store. The franchise operators conducted their businesses as independent contractors but were subjected to a number of restrictions which tended to create a uniform system of operation.

In some instances the franchisee erected his own store on premises subleased from Carvel. In other cases the franchisee leased a completed store as well as the land. All stores were constructed according to plans and specifications approved by Carvel. The ice cream sold by the

stores is dispensed through certain machines designed by the defendants and bearing the Carvel name or trademark. The ice cream so dispensed is processed from an ice cream mix which the franchisee bought through Carvel from a dairy approved by Carvel. The mix is prepared from a special approved formula which was developed by Carvel and which is kept confidential by the dairies. Under the franchise agreements Carvel receives a royalty of twenty-five cents a gallon on the mix used in the machines.

The plaintiffs' franchise agreements require the franchisees to operate their stores in accordance with a Standard Operating Procedure Manual (SOP). This SOP regulates the business of the operators in a number of respects. It describes the products which the operators may sell at their store, the advertising which they may use, the color they must paint their store, the hours when they must put on their lights, the amount of insurance they must carry, the colors of their employees' uniforms, and many other details. To the public the individual franchise operator appears to be part of a national organization which manufactures and distributes a limited type of products of uniform quality. The Carvel SOP refers to each store as "an integral part of the chain."

There are approximately 400 Carvel Dari-Freeze stores presently in operation, extending from Maine to Florida and as far west as Wisconsin. The stores do an estimated gross business of between six to eight million dollars annually. Carvel's sales to the stores of equipment, ingredients and supplies reached a high of $5,532,396 in 1957 and in 1960 totalled $4,460,689.

The operation of franchise stores, of which Carvel is an example, is a comparatively recent development. Franchise stores differ from the older established chain store operations in which the managers of the stores were not independent operators.

Opinion of Dawson, D. J.

The franchise method of operation has the advantage, from the standpoint of our American system of competitive economy, of enabling numerous groups of individuals with small capital to become entrepreneurs. The franchise business has had a phenomenal growth in the ice cream industry. If our economy had not developed that system of operation these individuals would have turned out to have been merely employees. The franchise system creates a class of independent businessmen; it provides the public with an opportunity to get a uniform product at numerous points of sale from small independent contractors, rather than from employees of a vast chain. The franchise system of operation is therefore good for the economy.

However, the cornerstone of a franchise system must be the trademark or trade name of a product. It is this uniformity of product and control of its quality and distribution which causes the public to turn to franchise stores for the product. This is well illustrated in the Carvel operation. The individual franchise to a dealer permits him to manufacture and sell Carvel ice cream from a store of uniform asd distinctive design that has as an integral structural feature the Carvel crown and cone trademark erected on the roof as a prominent identifying mark. All stores are also identically unique in that they have a flat, slanting roof, the front portion of the building consists only of glass walls and the name "Carvel" is displayed on each side in the form of neon signs over twelve feet in length and nearly three feet high. The building and the distinctive appurtenances thereto are protected by a design patent issued to Thomas Carvel. The ice cream is made and dispensed from a patented machine. Where the ice cream product which is sold to the public is such as would be placed in a paper container the name "Carvel" is written in script on the face of the container. Where it is necessary to provide a spoon with the ice cream product,

as in the case of a sundae, the spoon used is distinctive and unique in design, with the Carvel crown and cone at the end or top of the handle and the name "Carvel" written in distinctive script on the handle of the spoon.

It is this uniformity of stores and operation, and this advertising and the knowledge of the public of the uniformity and quality of the product that draws the business to the Carvel operators. The name Carvel constitutes a trademark of great value to the defendant companies and to the franchise operators.

It is well established that the owner of a trademark may license its use to another without abandoning his trademark. However, a naked license agreement without supervisory control over the product is invalid. *E. I. du Pont de Nemours & Co.* v. *Celanese,* 167 F. 2d 484, at p. 489 (C. C. P. A. 1948). The obligations of the trademark licensor were well expressed in *Morse-Starrett Products Co.* v. *Steccone,* 86 F. Supp. 796, at p. 805 (D. C. N. D. Cal. 1949):

> "* * * If the owner of a trademark wants to license the use thereof to another and still retain as his own the enjoyment of the rights stemming therefrom, he must do so in such a way that he maintains sufficient control over the nature and quality of the finished product, over the activities of the licensee, as will enable the licensor to sustain his original position of guarantor to the public that the goods now bearing the trademark are of the same nature and quality as were the goods bearing the trademark before the licensing, or, that the mark now has the same meaning as far as the public is concerned as it did before the licensing."

The validity of the franchise agreements and the other agreements between Carvel and the operators must be judged in the light of this fundamental rule relating to the protection of trademarks and trade names.

As was stated in *Coca-Cola Co. v. J. G. Butler & Sons*, 229 Fed. 224, 232 (D. C. Ark. 1916):

> "• • • The trademark laws, like the patent laws, give the owner a monopoly which neither the Sherman Act nor any other act of Congress forbids. It would be a paradox to say that the exercise of a right, expressly granted by law, is unlawful."

IV. Liability of the Supplier Defendants

The plaintiffs' case against the supplier defendants rests almost entirely upon the legality of the contracts of the supplier defendants with Carvel. The contracts are not uniform, but certain provisions are common to them, and the general charges made by plaintiffs are the same as respects all the supplier defendants.

The liability of the supplier defendants is predicated upon alleged unlawful conspiracies on the part of each of the supplier defendants with Carvel not to sell direct to the plaintiffs. The plaintiffs do not contend that the supplier defendants engaged in any common conspiracy with Carvel and with each other in furtherance of any illegal end. No evidence of any such conspiracy was offered; the plaintiffs relied on the agreements between Carvel and the supplier defendants to establish the unlawful conspiracies.

The contracts of the two dairy companies involved in this action, H. P. Hood & Sons, Inc. ("Hood") and Rakestraw's Dairy Products, Inc. ("Rakestraw"), are substantially similar. Hood and Rakestraw each agreed to manufacture and sell to Carvel all the "Carvel Mix" required by Carvel dealers located in the respective geographical areas to be serviced by each of them.[4] Carvel

[4] Hood delivered Carvel Mix to the stores of the plaintiffs in Massachusetts and Connecticut and Rakestraw made deliveries to the plaintiffs located in Pennsylvania.

agreed to purchase from the dairies all of its requirements of Carvel Mix for such stores. The supply contracts provided that Hood and Rakestraw should manufacture Carvel Mix according to a secret formula furnished by Carvel and that they would not disclose the formula to any unauthorized persons. In addition, Hood and Rakestraw agreed to "deliver only Carvel Mix to Carvel Stores, and no other ice cream mix or ice cream preparation of any kind." Deliveries of Carvel Mix were made by the dairies direct to the franchise operators.

It is difficult to see exactly what plaintiffs consider to be the illegality of the dairy companies' contractual arrangements with Carvel. The complaint alleges that the supplier defendants violated the antitrust laws by their refusal to deal direct with the plaintiffs. There is no allegation in the complaint that the provisions of the contracts under which the dairies agreed to furnish all of Carvel's requirements for Carvel Mix were illegal in themselves, and the plaintiffs failed to prove that such provisions were in fact illegal. See, *Tampa Electric Co. v. Nashville Coal Co.*, 365 U. S. 320 (1960); *United States v. Columbia Steel*, 334 U. S. 495 (1948).

As to the alleged refusal to deal direct, certainly the plaintiffs had no right to purchase Carvel Mix, made pursuant to Carvel's secret formula, other than on the terms which Carvel prescribed. Carvel had the right to bind the dairy companies to manufacture this secret formula mix solely for its own use or for persons whom it might designate. No outsider or any of the plaintiffs, without Carvel's approval, had the right to require the dairy companies to sell them this special formula mix. This conclusion seems obvious.

The same conclusion applies to the contracts of the two other supplier defendants, Eagle Cone Corporation and

Mohawk Container Co. Eagle Cone Corporation agreed to supply all of Carvel's requirements for certain special ice cream cones for the operators located in New York, Connecticut and Massachusetts. The Mohawk Container Co. contract was an agreement to sell in a six state territory certain paper products of an exclusive design which would be ordered by Carvel. These contracts were not shown to be in any way illegal, still less illegal *per se*. See *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953).

As a second possible basis for liability, the plaintiffs appear to rely on the fact that the supplier defendants would not sell them ice cream mixes other than the Carvel Mix (in the case of the two dairy companies) or other than Carvel approved merchandise (in the case of the other supplier defendants). As previously mentioned, the Hood-Carvel supply contracts provided that Hood would deliver no ice cream preparation other than Carvel Mix to Carvel stores and the Rakestraw contracts contained similar provisions.[5]

Plaintiffs' argument that these provisions are illegal must fail for several reasons:

First, the argument assumes the illegality of Carvel's restrictions on using only Carvel Mix and other approved products in the franchised stores—an assumption that is rejected in a subsequent section of this opinion.

Secondly, the plaintiffs failed to prove that any of the supplier defendants were asked to make sales of unapproved merchandise and that they refused to do so.

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[5] The contracts of Eagle Cone Corporation and Mohawk Container Co. contained no provision that these companies would not sell the operators non-Carvel approved merchandise and the plaintiffs failed to prove that any such policy existed independent of the contracts.

Thirdly, even if the supplier defendants agreed with Carvel not to sell other than Carvel approved products to the franchise operators, such an agreement by two persons not in competition with each other would not have constituted an illegal boycott. *Packard Motor Car C. v. Webster Motor Car Co.*, 243 F. 2d 418 (D. C. Cir.), *cert. denied*, 355 U. S. 822 (1957); *Schwing Motor Car Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.) *aff'd per curiam*, 239 F. 2d 176 (4th Cir. 1956), *cert. denied*, 355 U. S. 823 (1957).

Finally, the plaintiffs made no showing that they could not obtain non-Carvel merchandise from other suppliers or that the refusal of the supplier defendants to sell them such merchandise deprived the plaintiffs of any access to these goods.

In conclusion, plaintiffs' evidence failed to make out any illegal conduct on the part of the supplier defendants and the case against them must therefore be dismissed.

V. Validity of Requiring the Use of the Supplier Defendants' Products to the Exclusion of Others.

In considering the particular violations of the anti-trust laws charged against Carvel, it is necessary to distinguish between the arrangements that Carvel had with its operators prior to May 1, 1955, and the agreements entered into after that period. In 1954 the Federal Trade Commission made an investigation of Carvel's method of conducting its business. No complaint was ever issued and no formal hearings were ever held before the Federal Trade Commission. However, Carvel retained counsel to review the manner of conducting its business operations and, on their advice, it revised its franchise agreements and other documents in a number of respects. Therefore it will be neces-

sary to examine Carvel's method of doing business prior to May 1, 1955, as well as its present method of doing business. The plaintiffs in the Susser, McCoy, Mueller and Frederick cases entered into their franchise agreements prior to May 1, 1955. The plaintiffs in the others cases [6] all entered into their agreements after May 1, 1955.

The complaints allege that the Carvel defendants designed the franchise agreements to compel the franchise operators to deal only with the supplier defendants. The restrictive provision in the franchise agreements entered into prior to May, 1955 was as follows:

> "4. The Operator does hereby agree during the life of this Franchise Contract as follows:
>
> (c) To purchase only Carvel Special Formula Mix from a source of supply designated by Carvel.
>
> (d) To purchase from Carvel all equipment necessary for the operation of the Store at Carvel standard prices and to pay for same on terms as agreed between the parties hereto in separate Sales Contract attached hereto and made part hereof.
>
> (e) To purchase and use only standard Carvel approved printed paper goods, napkins, cones, extracts, spoons, and all other Carvel products at standard market prices."

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[6] Módick, Ossola, Phelan, Pierce, Rodens, Sue, Pazdro and Giberman. (The cases involving the plaintiffs Pierce, Mueller, Frederick and Rodens, which were begun in the Eastern District of Pennsylvania, were consolidated before being transferred to this court. This accounts for the reference to twelve names of plaintiffs in the nine cases covered by this opinion.)

The post-1955 franchise agreements contain the following provisions:

> "SIXTH: In order to safeguard th integrity of the Carvel trade-marks, the Dealer agrees that he will purchase from Carvel or from approved sources designated by Carvel, his entire requirements of Carvel's Frozen Dairy Product mix, toppings, flavorings and other ingredients, cones and any other items sold as a part of the end product that is offered for consumption to the retail purchaser as scheduled in the Standard Operating Procedure Manual * * *.
>
> * * *
>
> NINTH: In connection with the operation of a Carvel Store and to comply with the specifications set forth in the Manual, the Dealer is required to purchase various items of machinery and equipment and paper goods, a list of which is set forth in the Manual. To the extent that Carvel is able to supply the same, the Dealer shall have the right to purchase such machinery, equipment and paper goods, if he so desires, from Carvel, at prices fixed by Carvel from time to time. The Dealer's obligation under this paragraph is satisfied so long as the Dealer equips his store and keeps it maintained in accordance with the specifications contained in the Manual. In the event that the Dealer desires to purchase his printed paper goods from sources other than Carvel, Carvel shall license manufacturers of such products to print the Carvel name thereon in connection with sales to the Dealer, with products made in accordance with Carvel standards."

The first problem to be considered is whether Carvel may lawfully require the franchise operators who purchase

freezers[7] from Carvel "to purchase only Carvel Special Formula Mix from a source of supply designated by Carvel." In this respect the pre-1955 agreements and the post-1955 are substantially similar. The sources of supply which Carvel designated were various dairies, two of which, Hood and Rakestraw, are defendants in these actions. The provision in the franchise agreements which operates to obligate the dealers to purchase Carvel Special Formula Mix from these defendants is attacked by the plaintiffs as an unlawful tie-in under Section 1 of the Sherman Act and Section 3 of the Clayton Act, 15 U. S. C. §§ 1, 14.

It is doubtful whether Section 3 of the Clayton Act is applicable to the kind of restriction here involved. Section 3 prohibits restrictions in sales or leases preventing the use of goods or other commodities of "a competitor or competitors of the lessor or seller." Since Carvel, which has imposed the restriction, does not itself manufacture ice cream mix, it is doubtful whether dairy companies producing ice cream mix can be considered "competitors" of Carvel so as to bring Section 3 into application. However, it is unnecessary to resolve this question since the arrangement here involved is not of the type which could be held illegal under the provisions of either Section 1 of the Sherman Act or Section 3 of the Clayton Act.

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[7] It is not altogether clear in Carvel's arrangements with its operators what the tying device may be considered to be and what product or products are alleged to be tied in. Logically the franchise, which is basic to the entire operation, or the dispensing freezers sold by Carvel, would seem to be the tying articles with the mix and accessory products tied in. Plaintiffs in their post trial brief do not assert that the franchise is a tying device but advance the theory that in addition to the freezers the front assembly plate for the freezers (which happens to be patented and which is leased to the operators) is a tying article. This attempt to bring in an incidental patented article as a tying device as to which "dominance" may be presumed is unrealistic and cannot be accepted. This opinion proceeds on the basis of plaintiffs' other contention that the dispensing freezers sold by Carvel are the tying articles.

The plaintiffs rely on a number of cases in which various tie-in arrangements have been held illegal under the anti-trust laws. It is true that "tying agreements fare harshly under the laws forbidding restraint of trade." *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594, 606 (1953). The following cases illustrate types of tie-ins which have been condemned. *United Shoe Machinery Corp.* v. *United States*, 258 U. S. 451 (1922) (lease of patented machines on condition that leased machinery should not be used with shoes upon which certain other operations had not been performed on other machines of the lessor and on condition that lessee should purchase supplies exclusively from the lessor); *International Business Machines Corp.* v. *United States*, 298 U. S. 131 (1936) (lease of patented tabulating machines on condition that lessees should use with such machines only patented tabulating cards also manufactured by the lessor); *Mercoid Corp.* v. *Mid-Continent Investment Co.*, 320 U. S. 661 (1944) (use of patent license to tie in unpatented elements); *International Salt* v. *United States*, 332 U. S. 392 (1947) (lease of patented salt machines on condition that all salt consumed in the machines be purchased from lessor); *Northern Pacific Ry. Co.* v. *United States*, 356 U. S. 1 (1958) (sale of land with preferential routing conditions); *United States* v. *General Motors Corp.*, 121 F. 2d 376 (7th Cir. 1941) (requiring purchasers to deal with finance companies controlled by the automobile manufacturer).

The plaintiffs are unable to bring themselves under these cases for a number of reasons.

First of all, none of the cases in which tie-ins were held illegal involved the sale of products to the public under the trademark of the person imposing the restriction. The right of the franchisees to use the Carvel trademark was undoubtedly a valuable property right which, because it had been extensively advertised, and was associated with a particular product, had generated considerable good will. It is well settled that the licensor of a trademark not only

is justified in imposing restrictions on his licensee but, indeed, is obligated to do so in order to make the license a valid one. See, *e.g., Arthur Murray, Inc.* v. *Horst,* 110 F. Supp. 678 (D. Mass. 1953) (license to use name "Arthur Murray" conditioned upon agreement to employ only dancing instructors trained in the "Arthur Murray method"). In *The Coca-Cola Bottling Co.* v. *The Coca-Cola Co.,* 269 Fed. 796 (D. Del. 1920) it was held that an agreement to buy Coca-Cola syrup exclusively from the manufacturer mark, not to sell substitute or imitation products, was not violative of the Clayton or Sherman acts.

The rationale of these latter cases applies here. Carvel, which had developed a secret formula for ice cream mix, was justified in requiring the operators to use this mix in making sales to the public under the Carvel name. The end product which was sold to the public *was Carvel ice cream,* and it was this product to which the Carvel trademark and good will attached. The restrictions imposed by Carvel fall within the permissible limits approved in *FTC* v. *Sinclair Refining Co.,* 261 U. S. 463 (1923). In that case Sinclair, a refiner of gasoline, leased underground tanks and gasoline pumps to retail dealers on the condition that the equipment should be used only with gasoline supplied by the lessor. The Supreme Court held that no violation of the Clayton Act was involved.[8]

In *Times Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 607 (1953), the Court explained the significance of the *Sinclair* case by pointing out that there "the arrangement merely prevented lessees from dispensing other types of gasoline through the lessor's brand pumps and was thus viewed as a means of protecting the good-will of the lessor's branded gas." On the authority of the *Sinclair* case it is

[8] See Standard Oil Co. v. FTC, 273 Fed. 478, at 481 (2d Cir. 1921)—"It is unfair and dishonest to give out from a pump bearing one brand another maker's oil. * * *."

clear that Carvel has the legitimate right to require that only its special formula mix be dispensed from the machines and equipment sold to the franchise operators which bear the Carvel trademark. See also *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U. S. 3 (1936), in which a contract of an automobile manufacturer with a dealer that the dealer would not sell or use in the repair of any of the manufacturer's vehicles any part not manufactured or authorized by the automobile manufacturer was held not to violate the antitrust laws.

As regards the accessory products such as toppings, cones and paper goods, these products are so closely related to the ice cream mix that Carvel is entitled to designate approved sources of supply as the franchise agreements provide. To require Carvel to limit itself to advance specifications of standards for all the various types of accessory products used in connection with the mix would impose an impractical and unreasonable burden of formulation and policing and is not required by the antitrust laws. It is to be noted however that the agreements indicate that Carvel would approve the use of accessory supplies from alternate sources of supply if an adequate check on standards could be maintained. In this there is no violation. See *Standard Oil Co. of California* v. *United States*, 337 U. S. 293, 306 (1949). There was no indication that Carvel reaped any profit itself from any of the tie-ins.

In any event, it is plain that the restraints in the nature of tie-ins which are attacked by the plaintiffs cannot be declared *per se* illegal, which is the only type of illegality on which the plaintiffs rely. The extent to which tie-ins may be regarded as *per se* illegal under the antitrust laws is far from clear. See Turner, "Validity of Tying Arrangements Under the Antitrust Laws," 72 Harv. L. Rev. 50-75 (1958). Certainly in this case no *per se* illegality was demonstrated. The plaintiffs made no showing, as ordinarily required under the cases, that Carvel occupies a dominant position as a franchisor of soft ice cream or seller of ice cream

freezers, or even that a substantial amount of commerce in the "tied" products was foreclosed. In the absence of these facts there is no basis for recovery. *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953).

VI. Prohibition of Sale of Non-Carvel Products.

The franchise agreements entered into prior to May 1955 provided in Paragraph 4 that the operator agreed

> "(a) To maintain, conduct and operate a Carvel Store at the premises hereinafter mentioned conforming in all respects to the Carvel Methods, Operating Techniques and Standards and to sell therein only frozen dairy products established as standard products in Carvel Stores. All operating techniques and standards shall be subject to change by Carvel upon notice to Operator.
>
> (b) That all merchandise purchased in said Store shall be under the Carvel label, established as such by Carvel, and Operator is to refrain from selling or dealing in any other products unless otherwise designated by Carvel."

The franchise agreements entered into after May 1955 provide that

> "The Dealer agrees to sell at the Carvel Store, Carvel's Frozen Dairy Product solely in accordance with the (Standard Operating Procedure) Manual and will sell no other product except as hereinafter expressly otherwise provided."[9]

The allegation that the franchise operators are prohibited by the foregoing provisions from dealing in other than Carvel products on their store premises presents a

[9] Both forms of franchise agreement permitted the operator to install one soft drink cup, dispensing machine and one cigarette vending machine at the outside of the store only.

separate problem from that of tie-ins, although such "exclusive dealing" involves related issues and has also been attacked under Section 3 of the Clayton Act as well as other antitrust laws.[10] There is no dispute that Carvel enforced the exclusive dealing provisions by notifying certain of the franchise operators to discontinue selling unauthorized merchandise and, in a few instances, brought suits to enjoin such violations of the franchise agreements.

Any consideration of the legality of Carvel's exclusive dealing arrangements with the franchise operators must involve an appraisal of the effect of the decision in the *Standard Stations* case, *Standard Oil Co. of Calif.* v. *United States*, 337 U. S. 293 (1949). The contracts involved in that case required the dealer to purchase from Standard all his requirements of one or more products, and in the fields which they covered, petroleum products and accessories, competitors were effectively excluded. These arrangements were held illegal.

There are several facts here which distinguish the position of the Carvel franchise operators from that of the dealers involved in the *Standard Stations* case. A distinction must be drawn first of all between the requirement that the franchise operators not sell competing brands of ice cream and the prohibition that the franchise operators not sell other types of products, such as hamburgers and coffee, completely outside the competitive ice cream line. The latter type of restriction was not involved in the *Standard Stations* case, nor could such a restriction be held illegal under Section 3 of the Clayton Act since there is no

[10] As with tie-ins, a number of cases have held certain kinds of exclusive dealing arrangements to be illegal. Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346 (1922) (agreement requiring purchaser of dress patterns not to deal in patterns of the seller's competitor); FTC v. Motion Picture Advertising Service Co., 344 U. S. 392 (1953) (contract prohibiting showing of competitors' films); Dictograph Products v. FTC, 217 F. 2d 821 (2d Cir. 1954), cert. denied, 349 U. S. 940 (1955) (restricting hearing aid dealers from selling products of competitors).

competition between Carvel's products and products outside the ice cream field. Section 3 of the Clayton Act prevents a seller or lessor from prohibiting his purchaser or lessee from dealing in the goods of "a competitor or competitors of the lessor or seller," but this prohibition is not applicable to Carvel's restriction on the sale of goods outside the ice cream line since Carvel is not competing with such goods.

No case has been found under any of the antitrust laws holding that the franchisor of a valuable trademark cannot restrict the line of the business operated by his franchisee. Carvel is in the business of franchising ice cream dealers and should not be forced by the operators to enter into or lend its name to other lines of business. Naturally any food products sold on the premises in a store of uniform specifications and displaying the Carvel sign would be attributed to Carvel. Any defects in quality, over which Carvel would have no control, would detract from the Carvel name and good will. Carvel is not, by these restrictions, taking any business for itself at the expense of its competitors and no injury to competition is shown.

The problem of whether the dealers may lawfully be prohibited from selling ice cream products which compete with the Carvel line is a closer question, in view of the decision in *Standard Stations,* but even here there are reasons why Carvel's restrictions should be sustained. The factual situation involved here is different from that in *Standard Stations* where the agreements "contained provisions which, both by the language used and the limitations of liability, stressed the character of the agreement as seeking to establish the dealer as an independent contractor." *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 855 (S. D. Calif. 1948) *aff'd*, 337 U. S. 293 (1949). The dealers were little more than the wholesale purchasers of Standard's products and they were not part of a closely controlled franchise operation where the operators function in many respects as an integral part of the entire Carvel operation. Standard Oil's method of operation was to

sell its own products to its dealers, but the ice cream mix and accessory products which, as a technical matter, are sold through Carvel, are not produced by Carvel. Carvel is in the business of franchising stores; it is not in the business of manufacturing ice cream mix, cones or napkins. The exclusive dealing provisions as to these products are aimed primarily at control of quality and are not part of a design by Carvel to monopolize business in any of these fields. Under these circumstances the exclusive dealing provisions in Carvel's franchise agreements are not violative of the antitrust laws. See, *Pick Mfg. Co.* v. *General Motors Corp.*, 80 F. 2d 641 (7th Cir. 1935), *aff'd per curiam*, 299 U. S. 3 (1936); *Boro Hall Corp.* v. *General Motors Corp.*, 124 F. 2d 822 (2d Cir. 1942); *cf.*, *Arthur Murray, Inc.* v. *Horst*, 110 F. Supp. 678 (D. Mass. 1953).

As a practical matter, it may be noted that there is no evidence that the Carvel operators are particularly interested in selling other kinds of ice cream. The testimony that was given during the trial of the fraud aspect of these cases indicated that the operators were more concerned with expanding their line of business into other fields than with selling additional brands of ice cream.[11]

In any event, since the plaintiffs have voluntarily limited themselves to *per se* violations, they cannot succeed in their attack upon the exclusive dealing provisions in the franchise agreements. It is plain that exclusive dealing provisions, although they may be illegal under certain circumstances, are not illegal *per se*. *Bascom Launder Corp.* v. *Telecoin Corp.*, 204 F. 2d 331 (2d Cir.), *cert. denied*, 345 U. S. 994 (1953). They can only be held illegal if, within a relevant market, they substantially lessen competition. The plaintiffs, presumably in accordance with their *per se* theory of illegality, offered no evidence as to the

[11] One complained of his inability to sell hamburgers; one complained that he could not use the premises to sell Christmas trees.

relevant market nor did they show that competition was substantially lessened. On this record the plaintiffs have not made out a case for relief.

VII. Validity of Pricing Provisions in the Franchise Agreements

The challenged pricing clause in the franchise agreements used *prior to May 1955* required the operator "to maintain prices on products designated in, and as per Carvel Standard Operating Procedure and not to conduct any reduced price sales of these items without written consent from Carvel." Section "J" of the pre-1955 SOP provided for certain stated "standard selling prices" which were established by Carvel. Section "K" of the early SOP, entitled "General Information," contained the following sentence: "In the event that you plan a special sale or promotion other than those planned by your company, it is necessary to secure permission to sell merchandise at a price below the standard permitted." These provisions show clearly that the prices at which ice cream was sold to the public were set by Carvel and not by the operators.

It has been established beyond any possibility of dispute that agreements fixing prices are illegal *per se* under Section 1 of the Sherman Act. *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*, 220 U. S. 373 (1911); *United States* v. *Trenton Potteries Co.*, 273 U. S. 392 (1927). "Where such restraints are established, in purpose or in effect, inquiry under the Rule of Reason ends." *Report of the Attorney General's National Committee to Study the Antitrust Laws*, 12 (1955).

The facts of the present case afford no basis for approval of Carvel's policies under the doctrine of *United States* v. *Colgate & Co.*, 250 U. S. 300 (1919), since here there is no unilateral refusal to deal but a direct agreement between the defendant and its franchisees setting the prices at

which ice cream products may be sold. The defendants do not attempt to justify their agreements under state or federal fair trade laws; presumably because they recognize that no "resale" product is involved.

Carvel does urge that its pre-1955 price restrictions on its franchisees should be upheld as ancillary to the license of its trademark and the lease of the patented front plate for the dispensing machine. The contention is made that the price agreements should be sustained by extension of the principle announced in *United States* v. *General Electric Co.*, 272 U. S. 476 (1926), where it was held that a patentee who grants a license to make, use and sell the patented articles might fix the sales price "provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly." 272 U. S. 476, 490. The defendant relies for authority on *Straight Side Basket Corp.* v. *Webster Basket Co.*, 82 F. 2d 245 (2d Cir. 1936) to support the extension.

In the present state of antitrust law the defendant is unable to justify its actions under those cases. Insofar as the *Webster* case extended the principle of the *General Electric* case to permit prior fixing of unpatented products of a patented machine it must probably be regarded as unsound. *Darber-Colman* v. *National Tool Co.*, 136 F. 2d 339 (6th Cir. 1943); *Cummer-Graham Co.* v. *Straight Side Basket Corp.*, 142 F. 2d 646 (5th Cir. 1944); *American Equip. Co.* v. *Tuthill Bld'g Mat'l Co.*, 69 F. 2d 406 (7th Cir. 1934). Indeed, the *General Electric* doctrine itself is of such uncertain continuing validity that any extension of it at this time must be regarded as unwarranted. See *United States* v. *Line Material Co.*, 333 U. S. 287 (1948). The fact that the ice cream mix may have been made with a secret formula is of no consequence. *Dr. Miles Medical Co.* v. *John D. Parke & Sons Co.*, 220 U. S. 373 (1911).

The cases outlawing price fixing have been so sweeping that there would appear to be room for saying that even in as closely controlled a franchise situation as Carvel maintains, price fixing may be justified as ancillary to a valid business operation. While variable prices in different stores might conceivably jeopardize Carvel's good will and trademark interests, it is plain that absent any claim of statutory protection under the fair trade laws the price fixing provisions in the pre-1955 agreements must, under well-established case law, be held illegal. The fact that in 1955 Carvel radically changed these provisions of its agreements, presumably on the advice of counsel following the FTC investigation, shows that Carvel itself recognized the dubious status of these provisions.

The revised "Dealer's Franchise Agreement," which was adopted by Carvel *after May, 1955* and is still being used (with minor changes not here relevant), contains altogether different price provisions from the earlier agreements. Paragraph Eighth provides as follows:

> "The Dealer shall have the right to sell Carvel's Frozen Dairy Product and/or other items authorized for sale by him under the terms of this agreement at any price that the Dealer determines. Wherever Carvel recommends a retail price, such recommendation is based upon Carvel's experience concerning all factors that enter into a proper price, but such recommendation is in no manner binding upon the Dealer."

The revised SOP for the post-1955 period changed the reference in the earlier manual from "standard selling price" to "recommended selling price."

Section "K" of the SOP which prior to May 1955 contained a provision that it was "necessary" on special sales

to secure permission to sell at other than standard prices, was changed to read:

> "In the event that you plan a special sale or promotion other than those planned by your company, it is suggested that you secure permission to sell merchandise at a price below the standard permitted."

By letter dated February 27, 1956, the operators with agreements signed prior to May 1955 [12] were formally notified of Carvel's changes in pricing policy. The letter, in relevant part, read as follows:

> "All references in your agreement and/or the Standard Operating Procedure to the retail prices of Carvel's Frozen Dairy Products, in its various forms, are deemed to be references to *recommended* prices only. These prices are based upon your company's considerable experience, and the sincere conviction that the price so recommended is both acceptable to the public, and profitable to your operation. However, you are entirely at liberty to vary these prices if you so desire and we disclaim any intention to control your retail prices."

There was no evidence that after February 27, 1956 Carvel imposed on any of the franchise operators any duty to maintain given prices. In fact in this later period Carvel prepared advertising signs and posters in which prices were left blank, or on which stickers could be pasted with various prices selected by the operators. Certain correspondence which was introduced in evidence also supported the fact

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[12] The plaintiffs in the Susser, McCoy, Mueller and Frederick cases are in this category. (Although the date of the plaintiff Rodens' franchise agreement is April 11, 1955, the form of the agreement is that which was stipulated to have been used by Carvel after May 1, 1955.)

that Carvel had abandoned its earlier price maintenance policy. One of the plaintiffs' own items of evidence, a letter from Carvel dated September 3, 1957, which went out to all operators stated: "Our supply department has blank signs to use should you care to increase or decrease your prices."

There is no convincing evidence that the dealers do not presently have the right to fix their own sale prices to the public without penalty by Carvel. In the absence of any attempt by Carvel to impose a binding price structure, the fact that Carvel announced a schedule of suggested prices is not illegal. See *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U. S. 563 (1925); *Cement Mfrs. Ass'n* v. *United States*, 268 U. S. 588 (1925).

In conclusion, the price fixing provisions in the franchise agreements between Carvel and the plaintiffs in the Susser, McCoy, Mueller and Frederick cases were illegal and the illegality in each case extended from the dates on which the respective agreements were signed [13] until Carvel formally released the operators from such price fixing provisions on February 27, 1956. Damages for such periods of illegality may be recovered to the extent proved in these four cases in a subsequent trial, subject to the application of the statute of limitations as subsequently discussed. The plaintiffs in the other cases have no cause of action for illegal price fixing since they entered into their agreements after May 1, 1955 and there was no proof that Carvel ever compelled such operators to maintain fixed prices.

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[13] The relevant dates in these four cases are as follows:

Plaintiff	*Date of Franchise*
Susser	7/17/54
McCoy	10/30/54
Mueller	2/24/54
Frederick	2/11/53

VIII. General Defenses Raised by Carvel.

A. *Alleged Lack of Federal Jurisdiction*

Carvel, as a general defense to all claims against it, asserts that federal jurisdiction is lacking because the restraints relied on by the plaintiffs do not involve, directly affect, or substantially obstruct interstate commerce.[14]

It is not disputed that Carvel itself is engaged in interstate commerce. Indeed it could hardly be argued otherwise, considering the fact that Carvel is engaged in the business of franchising stores and selling equipment in at least six states and that approximately 400 stores are in operation in these states under the Carvel name.

Carvel urges, however, that the plaintiffs are not engaged in interstate commerce and, since the restraints under attack apply to the operators' businesses, no basis for federal jurisdiction exists. The argument states that even if some of the materials which the operators use moves to them in interstate commerce such materials come to rest at the retailer's establishment, and are thereafter manufactured and transformed into the finished products which are sold to the public in purely intrastate transactions. See *Page* v. *Work*, 290 F. 2d 323 (9th Cir. 1961); *Brosius* v. *Pepsi-Cola Co.*, 155 F. 2d 99 (3d Cir. 1945).

Whatever might be the validity of the defendants' argument if the restrictions involved were imposed on an isolated dealer, it is clear that where they form part of Carvel's general policy of conducting its business, interstate commerce is so affected as to give this Court jurisdiction. The restrictions pertain not merely to the way in which the plaintiffs conduct their business but also to the way in which Carvel conducts its business. In this light it is obvious that the requisite effect on interstate commerce is present. See

[14] None of the supplier defendants rely on this defense.

United States v. *Rock Royal Co-Operative, Inc.*, 307 U. S. 533, 568-69 (1939); *United States* v. *Standard Oil Co.*, 78 F. Supp. 850, 864-5 (S. D. Calif. 1948), *aff'd* 337 U. S. 293 (1949).

B. *Defense of the Statute of Limitations*

Section 15b of Title 15, U. S. C., provides that private treble damage suits are barred "unless commenced within four years after the cause of action accrued." Since the alleged violations on which the plaintiffs rely resulted from certain restrictive provisions in their franchise agreements, their cause of action first accrued at the time when the agreements were signed. If the plaintiffs' causes of action "accrued" for all purposes within the meaning of 15 U. S. C. § 15b at the date of the franchise agreements, then the plaintiffs in the Susser, McCoy, Phelan, Frederick, Mueller and Giberman cases would be barred from maintaining this suit because their actions were not commenced until more than four years after they entered into their franchise agreements.[15] However, as the plaintiffs point out, the defendants' actions were part of a continuing policy of doing business and the plaintiffs are entitled to recover for such unlawful practices as occurred within the four years preceding the filing of their complaint. *Cardinal Films, Inc.* v. *Republic Pictures Corp.*, 148 F. Supp. 156 (S. D. N. Y. 1957).[16]

The only violation of the antitrust laws which the plaintiffs have proven relates to the price fixing which took place under the old franchise agreements. The only parties to these agreements who are plaintiffs here are in the Susser,

[15] See Fleischer v. A. A. P., Inc., 180 F. Supp. 717 (S. D. N. Y. 1959).

[16] See Momand v. Universal Film Exchanges, 172 F. 2d 37, 49 (1st Cir. 1948).

McCoy, Mueller and Frederick cases. The other plaintiffs all signed franchise agreements embodying the current Carvel pricing policy which is not in violation of the antitrust laws. The parties to the earlier agreements were not shown to have been notified that Carvel no longer required them to maintain fixed prices until February 27, 1956. Therefore the parties to the old franchise agreements were presumably contractually obligated to maintain prices until February 27, 1956, at which time Carvel formally notified them of its change of policy. The complaints in the Susser, McCoy, Mueller and Frederick cases were all filed within four years of this date and they may therefore recover damages for the periods indicated below:

Plaintiff	Date of Franchise	Date Action Commenced	Period of Price Fixing for Which Damages May Be Recovered
Susser	7/17/54	9/11/59	9/11/55 to 2/27/56
McCoy	10/30/54	10/28/59	10/28/55 to 2/27/56
Mueller	2/24/54	9/ 5/58	9/ 5/54 to 2/27/56
Frederick	2/11/53	9/ 5/58	9/ 5/54 to 2/27/56

IX. Conclusions.

1. The action of the plaintiffs against the supplier defendants must be dismissed since the plaintiffs failed to prove that the supplier defendants participated in any illegal conspiratorial boycott against direct sales as alleged or that they engaged in any other violations of the antitrust laws.

2. The plaintiffs failed to show that the requirement imposed by Carvel that the plaintiffs use the supplier defendants' products or products approved by Carvel was an illegal tie-in or a violation of the antitrust laws in any respect.

3. The plaintiffs failed to prove that the restriction against selling other than Carvel approved products on plaintiffs' premises was an illegal form of exclusive dealing or violated the antitrust laws in any respect.

4. The price restrictions imposed by Carvel on the plaintiffs who signed their agreements prior to May 1, 1955 were illegal and the plaintiffs in the Susser, McCoy, Mueller and Frederick cases are entitled to a trial on the issue of damages; all other causes of action of these plaintiffs should be dismissed for failure of proof.

5. The actions of the plaintiffs in the Modick, Ossola, Phelan, Pierce, Rodens, Seu, Pazdro and Giberman cases should be dismissed in their entirety for failure of proof.[17]

X. Judgments to Be Entered.

1. Judgment shall be entered dismissing the actions against the following supplier defendants: Eagle Cone Corporation, H. P. Hood & Sons, Inc., Mohawk Container Company, Inc. and Rakestraw's Dairy Products, Inc.

2. Judgments shall be entered dismissing the actions of the plaintiffs against the individual defendants named in the complaints.

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[17] It may be noted that although franchise agreements of the type involved in this case have seldom figured in antitrust opinions, the general legal conclusions arrived at in this opinion regarding the legality of Carvel's method of conducting its business operations are supported by the recent unreported decision of the United States District Court for the District of Kansas in the case of Englbrecht v. Dairy Queen Company of Mexico, Missouri (No. W-1772 Civil—decided April 12, 1962). That case, which involved franchise agreements closely analogous to those at issue here, held that the provisions in those agreements were not in violation of the antitrust laws. In addition, the court there found that the defendant did not fix the prices at which Dairy Queen products were sold to the public.

3. Judgment shall be entered dismissing the actions of Lester N. Modick and Harriet M. Modick, of James Ossola and Elizabeth G. Ossola, or Joseph P. Phelan, of James P. Pierce and Rita Pierce and Sol Rodens, of Matthew Seu and Jane L. Seu, of Paul S. Giberman and Gertrude Giberman, and of Joseph Pazdro and Yolanda Pazdro.

In accordance with Rule 54(b) the Court directs that final judgments may be entered as to all of the causes of action hereinabove referred to. The Court finds there is no good reason for delay in the entry of such judgments.

Plaintiffs in the Susser, McCoy, Mueller and Frederick cases shall be entitled to a trial on the issue of damages arising out of any restrictions imposed by Carvel on prices to be charged by said plaintiffs for the periods beginning within four years prior to the filing of the complaints and running up to February 27, 1956; such trial to be set at the early convenience of the Court.

Let judgments be entered accordingly.

This opinion shall constitute the findings of fact and conclusions of law of the Court.

Dated: New York, N. Y.
June 7, 1962.

ARCHIE O. DAWSON,
U. S. D. J.